

# TRANSCRIPT OF RECORD

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## Supreme Court of the United States

OCTOBER TERM, 1948

**No. 135**

THE UNITED STATES, PETITIONER,

vs.

ALFRED W. JONES, RECEIVER FOR GEORGIA &  
FLORIDA RAILROAD

**No. 198**

ALFRED W. JONES, RECEIVER FOR GEORGIA &  
FLORIDA RAILROAD, PETITIONER,

vs.

THE UNITED STATES

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

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PETITION FOR CERTIORARI IN No. 135 FILED JULY 1, 1948.

PETITION FOR CERTIORARI IN No. 198 FILED AUGUST 5, 1948.

CERTIORARI GRANTED DECEMBER 6, 1948.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 135

THE UNITED STATES, PETITIONER

VS.

WILLIAM V. GRIFFIN AND HUGH WILLIAM PURVIS,  
RECEIVERS FOR GEORGIA & FLORIDA RAILROAD

No. 198

ALFRED W. JONES, RECEIVER FOR GEORGIA & FLORIDA  
RAILROAD, PETITIONER

VS.

THE UNITED STATES

ON PETITIONS FOR WRITS OF CERTIORARI TO  
THE COURT OF CLAIMS

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No. 45622

WILLIAM V. GRIFFIN, and HUGH WILLIAM PURVIS,  
RECEIVERS FOR GEORGIA & FLORIDA RAILROAD

vs.  
THE UNITED STATES

*History of Proceedings*

The original petition was filed February 2, 1942.

On December 28, 1944, on motion made therefor, and allowed by the court, the plaintiff filed its amended petition which is as follows:

*Amended Petition*

Filed December 28, 1944

(Original Filed February 2, 1942)

*To the Honorable the Chief Justice and  
Judges of the Court of Claims:*

I

Your petitioners, William V. Griffin and Hugh William Purvis, are Receivers of Georgia & Florida Railroad, a corporation which was duly incorporated in the State of Georgia on October 4, 1926, and in the State of South Carolina on November 26, 1926, and they were duly appointed and qualified as such receivers under order of the District Court of the United States for the Southern District of Georgia, made on the 19th day of October, 1929, in an equitable cause entitled Virginia Iron, Coal & Coke Company v. Georgia & Florida Railroad, Equity No. 207. A duly authenticated copy of the record of the appointment will be filed simultaneously with this petition.

II

The Railway Mail Pay Act of July 28, 1916 (United States Code, Title 39 Sections 523 to 568, inclusive) provides in forty-six sections comprehensively for the character, means and methods of mail transportation; defines the authority of the Postmaster General; and describes the obligations of the railroads and their right to compensation, which is to be fixed by the Interstate Commerce Commission.

Said Railway Mail Pay Act contains, among other provisions, the following:

"All railway common carriers are hereby required to transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith." (39 U.S.C. Sec. 541.)

"The Interstate Commerce Commission is hereby empowered and directed to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of such mail matter by railway common carriers and the service connected therewith, prescribing the method or methods by weight, or space, or both, or otherwise, for ascertaining such rate or compensation, and to publish the same, and orders so made and published shall continue in force and changed by the Commission after due notice and hearings." (39 U.S.C. Sec. 542.)

"For the purpose of determining and fixing rates or compensation hereunder the Commission is authorized to make such classification of carriers as may be just and reasonable and, where just and equitable, fix general rates applicable to all carriers in the same classification." (39 U.S.C. Sec. 549.)

"At the conclusion of the hearing the Commission shall establish by order a fair, reasonable rate or compensation to be received, at such stated times as may be named in the order, for the transportation of mail matter and the services connected therewith, and during the continuance of the order the Postmaster General shall pay the carrier from the appropriation for inland transportation by railroad routes such rate or compensation." (39 U.S.C. Sec. 551.)

Eleven sections of the Act deal with the procedure on hearings before the Commission. No provision is made in said act for a judicial review, but provision is made for administrative review by "re-examination" of an order, as follows:

"Either the Post Master General or any such carrier may at any time after the lapse of six months from the entry of the order assailed apply for a re-examination, and thereupon substantially similar proceedings shall be had with respect to the rate or rates for service covered by said application, provided said



carrier or carriers have an interest therein. (29 U.S.C. 553.)

Section 145 of the Judicial Code (28 U.S.C. Section 250), provides as follows:

"The Court of Claims shall have jurisdiction to hear and determine the following matters:

(1) *Claims against the United States.* First, All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however,* That nothing in this section shall be construed as giving to the said court jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as 'war claims', or to hear and determine other claims which, prior to March 3, 1887, had been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same.

### III

(1) On the first day of April, 1931, your petitioners filed their application with the Interstate Commerce Commission, designated as "*Railway Mail Pay, In the Matter of the Application of the Georgia & Florida Railroad Company for Increased Rates of Pay*" being a part of No. 9200 on the formal docket of the Commission, alleging that the rates being received for the transportation of the mails were not fair and reasonable, and requesting the Commission to re-examine the facts and circumstances surrounding such transportation and to fix and determine fair and reasonable rates to be received for services rendered on and after said April 1, 1931. A hearing was duly had thereon at which the applicants therein and the Post Office Department were given an opportunity to present evidence and be heard, and did, among other matters and things, present a study which showed the cost to the applicants of transporting the mails, which study was jointly made and agreed to by said applicants and the Post Office Department. After said hearings briefs were filed, the Examiner thereafter submitted a proposed report, and the case was orally argued before Division 5 of the said Commission.



(2) Thereafter, on the 10th day of May, 1933, said Division 5 of the Commission handed down the report of the Commission in said cause (192 I.C.C. 779), and also a certain order was made and entered in that proceeding on the 10th day of May, 1933. Thereafter, on July 6, 1933, said applicants filed their petition for a reconsideration in said cause, and the said Commission on the 3rd day of October, 1933, by its order entered on that date in said cause, denied said petition for reconsideration.

(3) As appears in said report, the Commission found (a) that said joint cost study showed that the deficit in net railway operation income from the transportation of mail by your Petitioners in 1931 was \$4,945.00, (b) that said joint cost study resulted in an approximately accurate ascertainment of the actual cost of service, and (c) that to eliminate said deficit in net railway operating income from the transportation of mail and allow a return of 5.75 per cent upon the total investment in road and equipment allocated and apportioned to mail based upon said cost study would require that the compensation received by your Petitioners for said transportation of mail be increased by 87.46 per cent over the compensation then being received.

(4) The Commission by its order held, contrary to the evidence and contrary to said findings of fact of the Commission, that the rates of pay then and theretofore received by Petitioners from transportation of the mail, which were established in *Railway Mail Pay*, 144 I.C.C. 675, (July 10, 1928) for railroads over 100 miles in length as a class, should continue to be received by petitioners for services rendered on and after April 1, 1931.

(5) Petitioners thereafter, on March 3, 1934, duly filed their petition in the United States District Court for the Augusta Division of the Southern Judicial District of Georgia, in Equity No. 207, seeking to have said order and decree of the Commission of the 10th day of May, 1933, perpetually set aside, suspended and annulled.

(6) At the hearing upon said petition before said Court the entire record before the Interstate Commerce Commission was introduced in evidence, and no additional evidence was presented to said Court. Following said hearing said Court found, among other things, in its opinion and decree filed January 23, 1935, that:

(a) "No other facts were established or sought to be established than those set forth in such order of said Commission, a copy of which is annexed to petitioners' complaint, and it is therefore considered unnecessary and redundant to restate Findings of Fact

as provided by Equity Rule 70<sup>1</sup>2. The challenge is to the conclusion drawn from undisputed facts.

(b) "The facts developed in the 'cost study' fully set forth in such order of the Commission were ascertained by the application of rules prescribed by the Commission."

(c) "Such 'cost study' disclosed among other facts that 'There was (1) a deficit in net railway operating income from mail of \$4,945,000 based upon 1931 operations.'"

(d) "It further disclosed that as regards revenue: 'The distribution of expense upon the space ratios shows that the ratio for mail service was 102.79' or that for every dollar applicants received for transporting mails they expended one dollar and 2.79 cents."

(e) "There is no attack upon the efficiency of the operation of this railroad. There is no charge of extravagance."

(f) "The fact that this railroad lost more money on other services rendered by it or that other railroads transported mail under similar, if not identical conditions, at a profit or that this railroad belonged in a certain classification (established by such Commission, known as Class I railroads and that therefore it should be in accord with other railroads of such Class as to compensation as to mail, do not refute or impair the fact that the compensation allowed this railroad for the transportation of mail does not equal the cost of so doing."

(g) "The bald fact remains that this railroad is required in order to escape severe punishment (39 U.S.C.A. Section 563) to transport mail at a compensation fixed by such Commission and that such compensation does not pay the actual cost of service. This compensation is not in compliance with the duty on the United States to pay 'fair and reasonable compensation' and is not 'just and equitable'."

(h) "Said Commission shall take such further action in the premises as the law requires in view of the annulment and setting aside of said order of May 10, 1933. Inasmuch as this court has not the authority to fix the compensation we do not deal with the question of what per cent. of return on the investment, if any, would be required to make the compensation fair and reasonable."

(i) Thereafter the Interstate Commerce Commission, by its order of March 12, 1935, reopened the said proceedings

in said Docket 9200—*Railway Mail Pay, In the Matter of the Application of the Georgia & Florida Railroad Company for Increased Rates of Pay.* A hearing was had on the 24th and 25th days of June, 1935, and at said hearing no new or other cost study was offered or proposed, and no attempt was made by the Post Office Department or Petitioners to dispute the basic facts of said cost study, and no evidence was offered or received in contradiction of the evidence previously taken in the original proceedings. The character of the evidence which was received in this further hearing is described by the Commission in its report and order of February 4, 1936 (214 I.C.C. 66), as follows:

9 "At the further hearing the Post Office Department, hereinafter called the department, put in evidence the detailed rules governing separation of operating expenses between freight service and passenger service in the study of expense for transporting mail on the Georgia & Florida based on a test period of 28 days, September 28 to October 25, 1931. Space and other data included in that study are described in the prior report. No additional tests have been made.

"\* \* \* The methods employed for the initial division between freight and passenger were explained by the department at the further hearing. The department also showed the result of applying the methods to the primary operating accounts for the year 1931. Additional analyses of the data were furnished by the department and the applicant."

"The evidence for the Post Office Department was addressed only to the point that the cost study of 1931 was based on formulas prescribed by the Interstate Commerce Commission, and not upon direct segregation and exact allocation of each separate class of investment and expense; and not only was no attempt made to suggest any other way to allocate the expense, or to contend that, by any other method, the result would have been any different, or would be more advantageous to one side than to another, but, to the contrary, testimony for the Post Office Department was that it was the most accurate method of determining costs that they could devise.

(8) Thereafter, following the filing of briefs and the hearing of oral argument, the Interstate Commerce Commission, on February 4, 1936, rendered its report on further hearing (214 I.C.C. 66), in which it again found that to meet the total railway operating expenses allocated and apportioned to the transportation of mail and to yield a return of

5.75 per cent upon the total mail-service investment of \$457,082 would require an increase of 87.4 per cent in the rates then (February 4, 1936), paid, but nevertheless entered its order of the same date that the rates of pay then and theretofore received by Petitioners for transportation of the mail, which were established in *Railway Mail Pay*, 144 I.C.C. 675 (July 10, 1928) for railroads over 100 miles in length as a class, should continue to be received for services rendered on and after April 1, 1931.

(9) Thereafter, on June 20, 1936, your Petitioners filed a supplemental petition in the United States District Court for the Augusta Division of the Southern Judicial District of Georgia, in Equity No. 207, seeking to perpetually set aside, suspend and annul said order of the Commission of the 4th day of February, 1936. A hearing was had at which was presented the entire record before the said Commission upon the reopening of said proceeding, and at which no other evidence was introduced, and on February 23, 1937, said Court decreed that said order of the Interstate Commerce Commission of February 4, 1936, be set aside and annulled and that said Commission should take such further action in the premises as the law requires in view of the annulment and setting aside of said order.

(10) Thereafter, on April 16, 1937, the United States of America and the Interstate Commerce Commission appealed to the Supreme Court of the United States from said order of the United States District Court for the Augusta Division of the Southern Judicial District of Georgia. Upon said appeal the question of jurisdiction of the specially constituted Three-Judge District Court was for the first time raised, and on December 13, 1937, the Supreme Court indicated that the said specially constituted Three-

11 Judge Court had jurisdiction, but in its decision handed down on February 28, 1938, determined that the remedy provided by the Urgent Deficiencies Act of October 22, 1913, Chapter 32, 38 Stat. 208, 219, 220, was not applicable to said order of the Interstate Commerce Commission. The Supreme Court then went on in said opinion to state:

"If the Commission makes the appropriate finding of reasonable compensation but fails, because of an alleged error of law, to order payment of the full amount which the railroad believes is payable under the finding, the Court of Claims has jurisdiction of an action for the balance, as the claim asserted is one founded upon a law of Congress. *Missouri Pacific R. R. v. United States*, 271 U.S. 603. Compare *United States v. New York Central R. R.* 279 U.S. 73, affirming 65 Ct.



Cls. 115, 121. And since railway mail service is compulsory, the Court of Claims would under the general provisions of the Tucker Act, have jurisdiction also of an action for additional compensation if an order is confiscatory. *United States v. Great Falls Mfg. Co.*, 112 U.S. 645; *North American Transportation and Trading Co. v. United States*, 253 U.S. 330, 333; *Jacobs v. United States*, 290 U.S. 13, 16."

#### IV

(1) During the entire period from April 1, 1931, to February 28, 1938, your Petitioners have furnished railway mail service to accommodate the United States mails in compliance with requisitions and orders of the Postmaster General. A 15-foot apartment has been furnished upon requisition by the Postmaster General, for which Petitioners have been paid for the entire period from April 1, 1931, to February 28, 1938, at the rate of 14.5 cents per mile. Three-foot closed pouch service has also been furnished upon requisition of the Postmaster General, for which your Petitioners have been paid for the entire period from April 1, 1931 to February 28, 1938 at the rate of 4.5 cents per mile.

(2) During the period from April 1, 1931, to February 28, 1938, your Petitioners received the following amounts for 15-foot apartment service:

\$23,477.34 for the period from April 1, 1931 to December 31, 1931;  
 \$31,227.47 for the year ended December 31, 1932;  
 \$31,078.04 for the year ended December 31, 1933;  
 \$29,518.95 for the year ended December 31, 1934;  
 \$23,593.98 for the year ended December 31, 1935;  
 \$23,652.06 for the year ended December 31, 1936;  
 \$23,509.99 for the year ended December 31, 1937;  
 \$ 3,790.29 for the period from January 1, 1938 to February 28, 1938.

(3) During said period from April 1, 1931 to February 28, 1938, your Petitioners received the following for 3-foot closed pouch service at the rate of 4.5 cents per mile:

\$2,469.85 for the period from April 1, 1931 to December 31, 1931;  
 \$3,221.28 for the year ended December 31, 1932;  
 \$3,206.35 for the year ended December 31, 1933;  
 \$3,045.30 for the year ended December 31, 1934;  
 \$2,426.34 for the year ended December 31, 1935;  
 \$2,454.62 for the year ended December 31, 1936;  
 \$2,447.16 for the year ended December 31, 1937;  
 \$ 392.28 for the period from January 1, 1938, to February 28, 1938.



(4) Said Commission in its findings of May 10, 1933, found that for the year ended December 31, 1931, the total operating expenses, railway tax accruals, net equipment and joint facility rents of your Petitioners were \$1,449,801, that the amount of said total expenses apportioned to the carrying of the mail was \$40,673, that Petitioners received \$35,728.00 for the carrying of mails during the calendar year 1931, exclusive of \$979.00 for service in motor cars and that the computed deficit in net railway operating income from mail was \$4,945.00 (192 I.C.C. 779).

(5) The Commission in findings dated May 10, 1933, found that for the year ended December 31, 1931, the total investment in road, exclusive of unrelated items, was \$15,864,462, and that of said amount \$438,803.00 was apportioned to the carrying of the mail.

(6) The Commission in said findings dated May 10, 1933, found that for the year ended December 31, 1931, the total investment of Petitioners in equipment, less depreciation, allocated to passenger-train service was \$135,257.00, and that of this amount \$18,279.00 was allocated and apportioned to the mail service.

(7) The Commission further found in said findings dated May 10, 1933, that for the year ended December 31, 1931, the total investment in road and equipment allocated and apportioned to mail was \$457,082.00, and that a return upon this computed at 5.75 per cent was \$26,282.00, which, added to the indicated deficiency in net railway operating income from mail of \$4,945.00, brings the total claim of Petitioners for increased compensation to \$31,227.00 per year. The Commission further found that to meet this need for increased compensation upon the basis of 1931 operations Petitioners would require an increase in compensation of 87.40 per cent.

14 (8) Upon reopening and rehearing the said Interstate Commerce Commission in its findings of February 4, 1936 found that the Post Office Department's exhibits, with which Petitioners concurred, showed Petitioners' investment in road and equipment allocated and apportioned to mail service was \$457,082.00; that a return of 5.75 per cent on this sum amounted to \$26,282.00, which, with the computed expense, brought the total need for increased compensation to \$31,227.00, to meet which would require an increase of 87.40 per cent in the rates then paid as of February 4, 1936.

(9) Petitioners aver that, on the basis of the aforesaid customary formulas, for the year 1931 they devoted property of a value of \$457,082.00 to the transportation of mail,

and that for the years 1932, 1933, 1934, 1935, 1936, 1937, and for the period ended February 28, 1938, Petitioners devoted property of a value of not less than \$457,082.00 to the transportation of the mails.

410) Petitioners aver that, on the basis of the aforesaid customary formulas, a return of 5.75 per cent upon said minimum value of said property for each of said years is \$26,282.00, that your Petitioners failed in all of said year to earn any return upon the value of said property, and that Petitioners had an operating deficit in the transportation of mail in the total amount of \$3,709.00 for the period from April 1, 1931 to December 31, 1931, and had annual operating deficits in the transportation of mail of not less than \$4,945 during each of the calendar years 1932 to 1937, inclusive, and an operating deficit in the transportation of mail of not less than \$824.00 during the period of January 1, 1938 to February 28, 1938.

15 (11) Petitioners aver that for the period from April 1, 1931, to February 28, 1938, they received \$218,054 from the United States Post Office Department and the United States Government for transportation of the United States mail, and that, on the basis of the aforesaid customary formulas, the amount due Petitioners as compensation for said service is \$392,753.48 which said amount represents an increase at the rate of 87.4 per cent over the amount actually received by Petitioners.

(12) Petitioners aver that for the period from April 1, 1931, to February 28, 1938, they have been paid by the United States Government for transportation of mail at the rate of 14.5 cents per mile for service furnished by Petitioners in 15-foot railway postoffice apartment units, and at the rate of 4.5 cents per mile for service furnished by Petitioners in 3-foot closed pouch units. Petitioners further aver that on the basis of the aforesaid customary formulas, they were entitled to receive from the United States Government from the period from April 1, 1931, to February 28, 1938, compensation at the rate of 27.17 cents per mile for the transportation of the mails in 15-foot railway postoffice apartment units, and at the rate of 8.33 cents per mile for service furnished by Petitioners in 3-foot closed pouch units.

Notwithstanding your Petitioners' claim of rights to increased compensation, the Post Office Department has failed to make payment on said basis at the rate of 27.17 cents per mile and at the rate of 8.33 cents per mile for mail transportation in 15-foot railway postoffice apartment units and in 3-foot closed pouch units, respectively, from and after April 1, 1931.

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V

Petitioners aver that from April 1, 1931, to February 28, 1938, both dates inclusive, they were required to perform services for and their property was taken for public use by the United States in that under the rules and regulations prescribed by the Postmaster General pursuant to the Act of Congress hereinabove referred to, they were compelled to carry the mail on their said Georgia & Florida Railroad, and were required to use and devote their train, railroad and station facilities and the services of their employees for such purpose, in consequence whereof and in accordance with said Act of Congress the United States became obligated to pay to your Petitioners fair and reasonable compensation in the amount of \$470,115.63 for said services and property, which fair and reasonable compensation the United States has failed and refused to pay to your petitioners, in lieu thereof paying at least \$252,061.63 less than it should have paid your petitioners as fair and reasonable compensation.

VI

Petitioners aver that the value of the property taken for which the petitioners were entitled to fair and reasonable compensation for the period from April 1, 1931 to February 28, 1938 is the sum of \$470,115.63, whereas they have received from the United States Post Office Department and the United States Government only \$218,054.00, and therefore that the lawful and proper amount due petitioners as compensation for the taking of such service is \$252,061.63.

17

VII

Petitioners aver that no action has been taken on this claim by Congress or by any of the Departments, Boards or Commissions of the United States Government other than above stated; that Petitioners are justly entitled to recover the amount claimed after allowing all just credits and offsets, and that there exists no debt, counterclaim or set-off by which the said claim should be reduced, and no part thereof has been paid; said claim has not been assigned or transferred in whole or in part; that your Petitioners are citizens of the United States and have at all times borne true allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

WHEREFORE, the premises considered, your Petitioners pray judgment against the United States in the sum of \$252,061.63, together with interest thereon at the rate of

six per cent per annum from the respective times when the pro-rata portions of said amount became due and payable to your petitioners.

MOULTRIE HITT,

*Attorney for Petitioners.*

237 Woodward Building,

Washington, D. C.

18 *Duly sworn to by Moultrie Hitt; and omitted in printing. (All in italics)*

19 *General Traverse*

Filed February 6, 1945

And now comes the Attorney General, on behalf of the United States, and answering the amended petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the amended petition be dismissed.

(S) FRANCIS M. SHEA,

*Assistant Attorney General.*

A. B. R.

D. B. M.

E. E. E.

*Argument and submission of case*

On March 4, 1947, the case was argued and submitted by Mr. Moultrie Hitt for plaintiff, and by Mr. D. B. MacGuineas for defendant.

21 *Special findings of fact, conclusion of law and opinion of the court by Littleton, J.*

Filed April 5, 1948

Mr. Moultrie Hitt for plaintiffs. Mr. G. Kirby Munson was on the brief.

Mr. D. B. MacGuineas with whom was Mr. Assistant Attorney General John F. Sonnett, for defendant. Mr. Armistead B. Rood was on the brief.

Plaintiffs seek to recover \$252,061.63 under the provisions of the Railway-Mail Day Act of July 28, 1916 (39 Stat. 412), as the difference between fair and reasonable compensation for carrying the United States mails during the period April 1, 1931 to February 28, 1938, inclusive (\$470,115.63), and the total amount paid by defendant for such period under an order by the Interstate Commerce Commission (\$218,054).

Defendant says, first, that the court does not have jurisdiction of the claim; second, that the court cannot set aside



the rates fixed by the Commission; third, that plaintiffs are barred from maintaining the suit because of acceptance without protest of payments over a long period of time; and fourth, that in any event part of the claim is barred by the statute of limitation.

#### SPECIAL FINDINGS OF FACT

1. The Georgia & Florida Railroad is a common carrier duly incorporated under the laws of the State of Georgia on October 4, 1926, and under the laws of the State of South Carolina on November 26, 1926. Plaintiffs are the duly appointed receivers for said railroad under the order of the

22 District Court of the United States for the Southern District of Georgia, duly made, given, and entered October 19, 1929, in a proceeding entitled *Virginia Iron, Coal & Coke Company v. Georgia & Florida Railroad*. Promptly after the entry of the order, the receivers duly qualified and ever since have been and still are the receivers for the railroad corporation and have operated and still operate the corporation's railroad and conduct its business.

2. At all times herein mentioned the lines of railroad operated by plaintiffs extended over 400 miles, including the lines of the Statesboro & Northern Railway operated by plaintiffs under lease. During the years here involved, the plaintiffs' revenues from all their lines averaged more than \$1,000,000 and it was classified by the Interstate Commerce Commission on that account as a "Class I Steam Railroad" under a system of classification promulgated by said Commission.

Plaintiffs' railroad was not constructed as a single line, but resulted from the combining of several local short lines, and its general characteristics were the same as those of short lines of 100 miles or less.

During the years and in the manner hereinafter more fully set forth, plaintiffs transported mail matter and rendered services in the transportation of the United States mails under the requirements of Section 5 of the Act of July 28, 1916, ch. 261, 39 Stat. 412, 425-431, often called the Railway Mail Pay Act.

3. For some time prior to operations under said Act, common carriers by railroad transported mail and rendered services in connection therewith under contract and for compensation measured by mileage and weight of the mail matter carried.

Section 5 of the Act provided among other things:

(1) That all railway common carriers are required to transport such mail matter as may be offered by the Post Office Department, in the manner, under the conditions, and



with the services prescribed by the Postmaster General, under penalty of a fine for refusal;

(2) That they shall be entitled to receive "fair and reasonable compensation" for such transportation and for the services connected therewith;

23 (3) That the Postmaster General readjust the compensation to be paid common carriers by railroad as soon as practicable after the 30th of June 1916, upon conditions and at the rates provided in said Act;

(4) That the Postmaster General file with the Interstate Commerce Commission a statement showing the transportation required of all common carriers with all information which might be material to an inquiry for the purpose of fixing rates of compensation for such transportation and service, and

(5) That, as soon as practicable and from time to time, the Interstate Commerce Commission fix and determine fair and reasonable rates of compensation for the transportation of mail matters by railroad carriers and the services connected therewith and prescribe the method or methods by weight, or space, or both, or otherwise, for ascertaining the rate of compensation, with the exception that the Postmaster General is authorized to make special contracts where conditions warrant higher rates than those specified in the Act, and report all such instances to Congress with reasons therefor.

The Post Office Department, the railroads, and the Interstate Commerce Commission use the word "authorize" to designate the requisitioning or ordering of transportation of mail pursuant to the Act, and that term, where used in these findings, will be as such connotation.

4. The Act specifies five classes of service:

*Full railway post office car service*, which consists of the transportation, handling, distribution (sorting and reassembling), and delivery of mail en route in full 60-foot railway post office cars, usually referred to as R. P. O. cars. These cars are equipped with special facilities to perform such work, which is done by post office employees.

*Storage car service*, which consists of the transportation of mails in full cars without distribution or other handling en route such as is performed in the R. P. O. cars. Railway employees perform the work incident to this class of service.

24 *Apartment railway post office car service*, which functions substantially the same as the full railway post office car service, except that, instead of an entire car, the railway post office occupies only an apartment 15 or 30 feet long in a combination car and the remainder of the car is available for other uses.

*Storage space*, which is approximately the same class of service as the storage car service except that it requires only a part of a car instead of an entire car, leaving the remainder of the car available for other uses.

*Closed-pouch service*, which is the transportation and handling of made-up mails in closed pouches in cars on trains upon which no R. P. O. or apartment cars are in use. The space involved in the closed pouch service is ordered in units of three and of seven feet of car length, extending on both sides of the car with room for passage in the middle.

The classes of service for which claim is made in the case at bar are the *apartment railway post office car service* and *closed-pouch service*.

#### RATES UNDER THE ORIGINAL RAILWAY MAIL PAY CASE

5. Pending determination of rates by the Interstate Commerce Commission, the Postmaster General, pursuant to said Act and with the consent of the Commission, put the space system of pay into effect on substantially all mail routes, in the manner and at the rates provided in the Act. Thereafter, the Postmaster General filed his statement of information required by the Act, and copies thereof were served upon all common carriers by railroad in the country. Subsequently, the Post Office Department and the railroads agreed upon a test period beginning March 27 and ending April 30, 1917, during which the quantity and carriage of mail upon all mail routes in the country was measured. Under instructions and upon forms prepared jointly by the Post Office Department and a committee selected by the railroads, reports were made by the greater part of the mail-carrying railroads, showing the distribution of space in cars moving in passenger trains, and the revenues derived from the several classes of passenger service, with a division of the cost thereof between passenger train service and freight train service, and with the passenger train service costs subdivided among the passenger, baggage, mail and express services. The reports were checked, reviewed, and corrected, and the basic figures and totals used by both parties in their calculations were brought into harmony. The study of the data and the reduction thereof of tabulation and statements required a period of nearly two years of painstaking work on the part of both the Post Office Department and the railroads. In addition, extended hearings were held at which a large number of statistics and other exhibits were presented and explained. Numerous witnesses, produced

by the Post Office Department and by the railroads, testified with respect to all phases of the operation of mail carriage by railroads and the services in connection therewith.

6. On December 23, 1919, the Commission made its written findings in an extensive report which set out the facts, the Commission's conclusions, and the reasons therefor. Said report and the order of the Commission made pursuant thereto, as published in 38 L. C. C. I. under the caption No. 9200, *Railway Mail Pay*, have been introduced in evidence herein.

In deciding, as directed by the Act, between methods for ascertaining the rate of compensation, the Commission determined that the space basis system inaugurated by the Postmaster General should be continued.

7. In entering upon the ascertainment of the cost of the mail service, there was agreement among the Post Office Department, the railroads, and the Commission as to the methods that should be pursued in allocating and apportioning expenses and property investments as between freight and passenger service. In breaking down the expenses of the passenger service and apportioning the costs respectively allocable to passenger, mail, and express, there was a controversy with respect to cost methods centering chiefly around the question of space properly chargeable against mail services.

8. Under the method adopted by the Commission, with immaterial exceptions, the mail service was charged with the entire car where an entire car was authorized, and the passenger service was similarly charged with entire cars used for passenger service.

Combination and mixed cars generally carried express and baggage, as well as mail, and usually there was space in such cars not covered by mail authorizations or used for either mail, baggage, or express. In considering such space, the Commission determined that compensation for mail should not be confined to the spaces specifically authorized under the space definitions in the Act, but should include a reasonable proportion of the unproductive space necessarily operated in connection with the authorized space. Accordingly, the Commission followed a plan which apportioned the unauthorized, unused, and unoccupied space in a combination or mixed car to mail and to baggage and express in the same ratio as space in the car was used by these services. Because of its peculiar requirements, space authorized for the mail service was considered as space used by it, whether or not such space was all actually used. The spaces and mileages involved were accounted for in car-foot miles.

Some combination cars contained a passenger compartment. In such instances the passenger service was charged with unused space in proportion to the amount of space used for the passenger compartment, when allocating the unused space.

This method of apportioning space, referred to in the Commission's reports as Plan 2, being substantially one of the alternative plans suggested by the Post Office Department, is the most practicable of any suggested; is fair and reasonable, and has remained the basis for the establishment by the Interstate Commerce Commission of rates for the purpose of affording fair and reasonable compensation for the transportation of mail by railway carriers, and is the method followed by the Commission in its second general Railway Mail Pay decision of July 10, 1928, as set forth in findings 11 to 14 herein, and followed by the plaintiff in the case at bar in its independent calculations, as set forth in findings 24 to 30.

9. Application of this method to the consolidated totals of space and mileage reported by 262 Class I and Class II railroads for the 35-day test period mentioned in finding 5, gave the following average percentages for the whole of car-foot miles in each of the classes of service named; that is, passenger (including baggage), 78.06%; express, 13.65%; mail, 8.29%; total, 100%.

Allocating space by application of the above-described method of apportionment, and taking into consideration operating expenses, taxes, equipment and joint facility rentals,

6% interest on investment, and other factors of cost and expense, and applying these percentages to the expense of operation and the investment chargeable to passenger train service, the Commission found certain fair and reasonable rates for the transportation of mail as shown in the Commission's finding hereinafter quoted.

The Commission took into consideration the comparatively greater operating expenses and operating conditions of railroads not exceeding 100 miles in length, and allowed for these differences in their determination of fair and reasonable rates.

10. The report of the Commission stated many facts in detail, but made specific "conclusions," which read in part:

After consideration of all the facts and circumstances of record we are of opinion and find:

1. That the space-basis system inaugurated under authority of the act of July 28, 1916, 39 Stat. 412, 425-431, shall be continued as herein modified and be extend-



ed to all mail routes; and that the Postmaster General shall, on or before March 1, 1920, place on the space basis the routes now paid on the weight basis.

3. That the fair and reasonable rates of payment for transportation of mail matter as of November 1, 1916, and to January 1, 1918, are as follows:

	Cents
For each mile of service by a 60-foot R. P. O. car	27
For each mile of service by a 30-foot apartment car	15
For each mile of service by a 15-foot apartment car	10
For each mile of service by a 60-foot storage car	28
For each mile of service by a 30-foot storage space	8
For each mile of service by a 15-foot storage space	5
For each mile of service by a 7-foot storage space	4
For each mile of service by a 3-foot storage space	2
For each mile of service by a 15-foot closed-pouch space	10
For each mile of service by a 7-foot closed-pouch space	5
For each mile of service by a 3-foot closed-pouch space	3

For separately operated railroads not exceeding 100 miles in length, and not less than 50 miles in length, 20 percent additional to the above rates; and separately operated railroads less than 50 miles in length, 50 percent additional: *Provided*, That the minimum payment on any mail route, over any part of which mail is transported not less than six days a week, shall be \$50 per mile per annum.

28 The fair and reasonable rates on and after January 1, 1918, are 25 percent additional to the rates prescribed as of November 1, 1916.

At the same time the report was made, a formal order was made embodying the matters found and concluded by the Commission, and ordering that the system, rules and ratings, set out therein, be established on or before March 1, 1920, and be observed, maintained, and applied until further order of the Commission.

Such rates were average rates determined from the aggregate amounts of services and costs of all the railroads reporting, and the order did not, except for additional allowances to two classes of short lines, apply the method to the particular circumstances of an individual railroad. Application of the average rates established by the Commission to the circumstances of the respective railroads does not produce the same relation between mail revenue and mail cost for all railroads, but the average rates were found by the Commission to be a fair average for general application.



11. In response to application for re-examination of the rates, the Interstate Commerce Commission reopened the proceedings in the Mail Pay case as to all railroads, except urban and interurban electric lines and some 41 short line railroads in intermountain and Pacific coast territory whose rates of mail pay were dealt with in separate proceedings.

Space data was obtained from a 30-day test period from September 16 to October 20, 1925. Hearings were held, testimony was given, and other evidence was introduced. In its report and findings the Commission reaffirmed as reasonably fair the method adopted in the original proceeding for determining the amount of unoccupied space allocable to each of the services.

12. On July 10, 1928, the Commission made its written findings in a report in which it set out the facts, its conclusions, and the reasons therefor. Said report and the order of the Commission made pursuant thereto, as published in 144 I. C. C. 675 under the caption No. 9200, *Railway Mail Pay*, have been introduced in evidence herein. In said report the Commission stated with respect to the Class I roads, that is, roads with operating revenues of \$1,000,000, or more, per annum:

Giving consideration to all the figures based upon the respective cost studies; to the fact that none of these figures except those in the carrier's exhibits, includes any charge against the passenger-train service for its proportion of the cost of handling nonrevenue freight; giving special weight to the figures based on the plan for the division of train space followed in the original proceeding and subsequent re-examinations; and making allowance for weaknesses of theories and methods, an increase of 15 percent in mail revenues for the carriers as a whole in this group is justified.

13. The report of the Commission stated many facts in detail, but made specific conclusions which read in part:

We find:

1. (a) That the rates of pay for the transportation of mail matter by railway common carriers subject to the act of July 28, 1916, with the exception of the carriers included in subparagraphs (b), (c), and (d) hereof, were not fair and reasonable on and after the dates the carriers filed their applications for re-examination in this proceeding, or, where such applications were not filed, on and after July 24, 1925, the date this proceeding was reopened for re-examination.

(2) That the fair and reasonable compensation to be received by said carriers from said dates to and includ-

ing July 31, 1928, is 15 percent in addition to the compensation paid or accrued at the established rates in effect during said periods except that the fair and reasonable compensation to be received by separately operated railroads not exceeding 100 miles in length, is 80 percent in addition to the compensation paid or accrued at the established rates for such roads, and except, further, that the fair and reasonable compensation to be received by the Woodstock Railway Company and the White River Railroad Company, whose rates of pay were established in *Railway Mail Pay*, No. I. C. C. 43, is 33 $\frac{1}{2}$  percent, in addition to the compensation paid or accrued at the rates in effect for service on their lines during said period.

3. That the fair and reasonable rates of pay to be received on and after August 1, 1928, by the said carriers, except those included in paragraphs 4 and 5 hereof, are as follows:

30'

For each mile of service by

15-foot apartment car

3-foot closed-pouch space

5. That the fair and reasonable rates of pay to be received on and after August 1, 1928, by separately operated railroads, not exceeding 100 miles in length, included in the findings in paragraph, numbered 1, hereof, are as follows:

For each mile of service by	(a) Separately operated railroads 50 to 100 miles in length	(a) Separately operated railroads less than 50 miles in length
	Cents	Cents
15-foot apartment car	27.00	34.00
3-foot closed-pouch space	8.00	10.00

New England lines were separately treated in said report and findings, and it was held that they were entitled to the same rate of increase as other Class I carriers, in addition to an increase of approximately 35 percent awarded December 13, 1923. The decision appears in a report published in 85 I. C. C. 157, under the caption No. 9200, *Railway Mail Pay, In the Matter of the Application of the New*

*England Lines for Increased Rates of Railway Mail Pay*, which report has been introduced in evidence herein.

A group of associated short lines presented separate data relating to the short lines represented by the group. It represented also the Georgia & Florida Railroad whose total mileage exceeded 100 miles and which was a Class I railroad by virtue of its operating revenues. The Commission made no special provision for the Georgia & Florida Railroad in its findings, and did not classify it among the short line railroads. In the application of the order, the Post Office Department included plaintiffs' railroad in the increase of 15 percent.

At the same time it made its report, the Commission made a formal order embodying the matters found and concluded by it, and directed the application of the increased rates.

31 14. Defendant delivered to the Georgia & Florida Railroad new orders, or "authorizations," effective as of August 1, 1928, for the transportation of mail on said railroad with the rates therein stated on the basis of the increase for railroads exceeding 100 miles in length, under the order of the Commission made July 10, 1928. Plaintiff transported the mail as required by said authorizations in 15-foot apartments in combination cars and 3-foot closed-pouch units, periodically submitted statements showing the services rendered, computing the amounts due at the rates fixed for railroads exceeding 100 miles in length, under said order of July 10, 1928, and received payments therefor on said basis. Plaintiffs accepted these payments without protest or formal complaint until they made application to the Interstate Commerce Commission on April 1, 1931, for a re-examination of the rates.

#### PROCEEDINGS ON PLAINTIFFS' APPLICATION FOR RE-EXAMINATION OF RATES

15. On April 1, 1931, plaintiffs filed a petition with the Interstate Commerce Commission alleging that the rates paid it for the transportation of mail were not fair and reasonable, and requesting that the Commission re-examine the particular facts and circumstances surrounding such transportation over plaintiffs' railroad and fix and determine reasonable rates to be paid plaintiffs for service rendered on and after that date. The Commission ordered such a re-examination, and a test period of 28 days, from September 28 to October 25, 1931, for the purpose of obtaining space and other data, was selected by the plaintiffs and the Post Office Department. In this period the space operated in all passenger trains was recorded, showing the amount used for passenger service, including baggage and miscel-

lancons, for express, and for mail. The units of service furnished by plaintiffs during the period were (1) 15 foot railway post office apartment units, and (2) 3 foot closed pouch service units.

16. On May 10, 1933, the Commission made its written findings in a report which is published in 192 I. C. C. 779, under the caption *Railway Mail Pay, in the Matter of the Application of Georgia & Florida Railroad Company for Increased Rates of Pay*, a copy of which has been introduced in evidence herein.

Said findings read in part:

Throughout the test period 3,045,704 car-foot miles were operated in passenger-train service for passenger proper, baggage, miscellaneous express, and mail. This total includes all passenger-train cars, passenger coaches, sleeping and dining cars, and combination and mixed-traffic cars, except motor cars. The distribution of the total among the several services is made in accordance with the plan used in prior cases. The method is described in *Railway Mail Pay, supra*. In this plan, referred to here and in the prior proceeding as plan 2, car-miles and car-foot miles of operation in cars employed exclusively for one service are referred to as full cars, whether loaded or not, and the entire operation of each is allocated to the service to which it is assigned. The space in combination and mixed cars is allocated to each service according to the space used, except that space authorized for mail is regarded as space used. The unused space in such cars is apportioned in proportion to the space used.

The space ratios are applied to the expenses. The ratios of expense so derived are used to apportion investment in road and equipment, except items directly allocated. The direct allocations are relatively small.

For the year ended December 31, 1931, the total operating expenses, railway tax accruals, net equipment and joint-facility rents were \$1,449,801. Of this amount 21.74 percent, or \$315,273 was apportioned to passenger train service in accordance with the formulas prescribed for Class 1 roads for the separation of expenses between freight and passenger services. Certain expenses were directly allocated to passenger traffic. The remainder was apportioned upon the space ratios as adjusted by the department. The total apportioned to mail was \$40,673. The computed deficit in net railway operating income from mail was \$1,945.



The total investment in road, excluding unrelated items, was \$15,864,462. Of this, 21.44 percent, or \$3,401,578, was apportioned by the department to passenger-train service. The part of the latter amount apportioned to mail upon the adjusted space ratio was \$438,803. The total investment in equipment, less depreciation, allocated to the passenger-train service was \$135,257, approximately 10 percent of the total. Of this amount, \$18,279 was allocated and apportioned to the mail service. The total investment in road and equipment allocated and apportioned to mail was \$457,082. A return upon this computed at 5.75 percent is \$26,282 which, added to the indicated deficiency in net railway operating income from mail of \$4,945, brings the total claim of the carrier for increased compensation to \$31,227. To meet it upon the basis of 1931 operations would require an increase in compensation of 87.40 percent.

The department opposes any increases upon the principal ground that the present rates were established as reasonable for all carriers based upon an examination of the service as a whole. The applicant, however, under the railway mail-pay statute is entitled to show, if it can, upon reexamination that in so far as it is concerned the rates so established are not fair and reasonable. In determining that issue we must take into consideration all factors that have a bearing upon it.

An examination of the data shows that of the three services included in passenger-train service as a whole the mail service makes the best showing with respect to revenue.

As shown before, the actual use of the units (3-foot pouch service) was considerably below the maximum capacity. The use of authorized space for mail in the space study instead of space actually occupied resulted in a somewhat higher space ratio and the apportionment of greater expense to the mail.

The 15-foot apartment unit earned by far the greater portion of the revenue.

Applicant bases its claim for higher rates upon the space data of the test period and their application in a cost study; and also upon the fact that, because of its low traffic density and low earnings per mile of road,

it is not comparable with many class I roads which receive the same rates of pay.

34. The cost study is not considered to be an accurate ascertainment of the actual cost of service. It is an approximation to be given such weight as seems proper in view of all the circumstances. See *Railway Mail Pay, supra*. The comparison of mail revenue with other revenue received for services in passenger-train operations shows that mail with relation to the other services is bearing its fair share of the expenses of operation and is contributing relatively more than the other services for the space furnished. Applicant receives the same rates as those received by other roads for the same kind of service. Many of these other roads are, as applicant points out, roads which are very much larger and which have greater traffic and lower unit operating costs. On the other hand many are in much the same situation as the applicant in respect of passenger-train operations. The data submitted fail to justify giving the applicant rates higher than those now paid other railway common carriers for like service.

We find that the rates of pay now received by applicant for the transportation of mail, established in *Railway Mail Pay*, 144 I. C. C. 675, for railroads over 100 miles in length, are fair and reasonable. The application for increased compensation is denied.

At the same time that it made its report, the Commission made a formal order in accordance with the report.

Plaintiffs petitioned the Interstate Commerce Commission to reconsider said order, which petition was denied October 3, 1933.

17. On March 3, 1934, plaintiffs commenced an action in the United States District Court, Southern District of Georgia, Augusta Division, entitled *W. V. Griffin and H. W. Purvis, Receivers for the Georgia & Florida Railroad, petitioners, v. United States of America and Interstate Commerce Commission, defendants*, Equity No. 207, in which plaintiffs asked for a decree declaring that the order of the Interstate Commerce Commission of May 10, 1933, be declared void; that it be set aside and annulled, and that the court direct the Commission to reopen and reconsider plaintiffs' application for determination of rates for transportation of mail. On January 23, 1935, the court duly made and entered its decree which reads in part:

It is therefore ordered and decreed:

(1) That said order of the Interstate Commerce Commission of May 10, 1933, is and has at all times been

unlawful and that said order be set aside and annulled.

(2). Said Commission shall take such further action in the premises as the law requires in view of the annulment and setting aside of the said order of May 10, 1933.

Inasmuch as this court has not the authority to fix the compensation we do not deal with the question of what percent of return on the investment, if any, would be required to make the compensation fair and reasonable.

18. Pursuant to the decree, on March 12, 1935, the Interstate Commerce Commission made an order reopening said proceeding. Further hearings were had, and on February 4, 1936, the Commission made its report which is published in 24 I. C. C. 66, under the caption No. 9200, *Railway Mail Pay, In the Matter of the Application of Georgia & Florida Railroad for Increased Rates of Pay*, a copy of which has been introduced in evidence herein. Said report concludes:

The matters disclosed in the original hearing upon this application, and considered by division 5 in its prior report, have been carefully considered by us in this reopened proceedings. We have had the benefit of additional testimony in respect of the conditions under which the authorized 45-foot railway postoffice apartment is furnished, of a more comprehensive analysis by the department of the underlying data upon which the space and cost studies were made, and of a more detailed examination of the space data, the revenues per car-foot mile and expenses per car-foot mile as related to passenger-train operations, as a whole and to each of the three services rendered in that operation.

Giving consideration to all the computations, the extent and cause of the operation of a substantial portion of the unused space, the fact that a theoretical cost and not actual cost is derived from the methods and plans adopted and the small amount of mail carried in the authorized units of service, we find upon this augmented record that the present rates for transportation of the mail by the applicant are fair and reasonable.

A formal order was made by the Commission at the same time, which reads in part:

It is ordered, That the rates of pay for the transportation of mail matter established in Railway Mail Pay, 144 I. C. C. 675, for railroads over 100 miles in length be, and they are hereby, established as fair and reasonable rates to be received by the applicant here-in for services rendered on and after April 1, 1931.

19. Plaintiffs filed a supplemental petition in the proceedings in the United States District Court, Southern District of Georgia, complaining of the action of the Commission in its order of February 4, 1936, and on February 23, 1937, the said District Court ordered and decreed (1) that the order of the Interstate Commerce Commission of February 4, 1936, was unlawful and that it should be set aside and annulled, and (2) that in view of the annulment of the order of February 4, 1936, the Commission take such further action as the law requires.

20. The Interstate Commerce Commission prosecuted an appeal from said decree to the Supreme Court, and on February 28, 1938, the Supreme Court decided that the jurisdiction of the three-judge District Court did not apply to the order of the Interstate Commerce Commission made February 4, 1936, in which said Commission declined to raise the rate. The decree was reversed with direction to the District Court to dismiss the bill. The decision is reported as *United States et al. v. Griffin et al., Receivers*, 303 U. S. 226. The court stated in its opinion (1) that if the Commission makes the appropriate findings of reasonable compensation, but fails because of alleged error of law to order payment of the full amount the railroad believes is payable under the finding, the Court of Claims has jurisdiction of an action for the balance, as the claim asserted is one founded upon a law of Congress, and (2) since railway mail service is compulsory, the Court of Claims would, under the general provisions of the Tucker Act, have jurisdiction of an action for additional compensation if the order is confiscatory. Plaintiff introduced the evidence supporting findings 15 to 23 under the first of these theories, and evidence supporting findings 24 to 30 under the second theory.

21. During the period involved herein, the following types of services were performed for defendant upon orders from defendant:

*R. P. O. apartment car service.* A 15-foot apartment is the minimum unit authorized for this type of service. It occupies one-fourth of the length of a 60-foot standard baggage car, partitioned from the remainder and supplied with fittings for a railway post office to enable a postal clerk employed by the Post Office Department to open pouches or packets and sort and reassemble mail matter en route for delivery at stations along the route. The plaintiffs had acquired and operated some cars with a 30-foot R. P. O. apartment, which at various times were furnished to the Post Office Department when a 15-foot space was ordered. In such event the postal clerks used only 15



feet of the 30-foot apartment, leaving the remainder unused, and the plaintiffs were paid on the basis of the rate for a 15-foot R. P. O. apartment.

• *Closed-pouch service.* Three feet of the length of the car was the minimum unit authorized for this type of service. Such space is used to store closed mail pouches being transported in a regular baggage car on a regularly scheduled train. The bags are handled by railroad employees and the railroad is responsible for their delivery. The 3-foot unit, if utilized to capacity, would be stacked with mail bags to the top of the car, leaving an aisle in the center. The unit is not, however, physically divided from the remainder of the available space and, generally, the mail bags are not stacked within a specified space, but are carried in whatever space may be convenient for handling. In such case, the 3-foot unit of service is measured by the number of mail pouches which could be stored feasibly in a 3-foot section as above described, which by actual tests averaged from 50 to 56. The number of pouches normally carried was less than the number comprising this minimum unit of space, but the pay was for the minimum of 3 feet.

During the period involved herein the plaintiffs transported mail for defendant on that part of their main line extending between Augusta, Georgia, and Madison, Florida, and on four of its branches.

22. After rendering services ordered by the Post Office Department, plaintiffs periodically submitted vouchers, known as "affidavits of service," to defendant claiming compensation. These vouchers showed the routes, trips, computed mileage, rates per mile, and the amounts claimed, all in accordance with the orders for service issued by the Post Office Department and at the rates fixed by the Interstate Commerce Commission. Plaintiffs were paid for the period here involved at the rates established for carriers with lines over 100 miles long by the order of the Interstate Commerce Commission dated July 10, 1928, in the second general *Railway Mail Pay* case, namely 14.5 cents per mile

for 15-foot R. P. O. apartment service, and 4.5 cents per mile for 3-foot closed-pouch service. Certain established minimum yearly rates as well as rates for transportation by truck for emergency substitute service were paid. The payments to plaintiffs for the years here involved, not including side or transfer services at terminals which were not covered by fixed rates, are shown in the table in finding 23.

23. On the basis of the joint cost study for the test period as adjusted for the entire year of 1931, the Interstate Commerce Commission's report of May 10, 1933, found that an

increase of 87.4% would be necessary to overcome the deficiency in net railway operating income under established rates and to provide a return on investment allocable to mail service at the rate of 5.75% per annum, if the method adopted by the Commission in the original and the second general *Railway Mail Pay* case as the proper method for determining an average rate for all railroads was applied to the particular circumstances of plaintiff's railroad operations.

The yearly amounts of pay actually received by plaintiffs for transportation of mail during the period here involved and the amounts of such an 87.4% increase are shown in the following table:

	Mail revenue received in years	87.4% of annual receipts
1931 from April 1st.....	\$26,812.14	\$23,453.81
1932.....	35,087.74	30,666.08
1933.....	34,920.09	30,520.76
1934.....	33,176.25	28,996.04
1935.....	26,632.32	23,276.05
1936.....	26,721.97	23,355.00
1937.....	26,068.10	22,783.22
1938 to February 28.....	4,205.03	3,675.20
Totals.....	213,623.64	186,702.06

#### COMPENSATION BASED ON COSTS AS NOW COMPUTED BY PLAINTIFFS

24. The increase of 87.4%, which was the basis of the foregoing table, is predicated on the space basis method adopted by the Commission in the prior mail pay cases applied to data secured from the test period in 1931 and to cost data then available, and the rate was then applied to the amounts of mail service actually furnished for the years here involved.

25. Since that time other data on costs for each of the years have become available, and still using the space basis method established by the Commission, plaintiffs have introduced evidence as to cost of mail service for such years based upon year-by-year operating expenses and investment, together with data on the actual amounts of mail carried.

Such evidence first separates the operating expenses and investments chargeable to passenger train service from those chargeable to freight service, in accordance with formulae prescribed by the Interstate Commerce Commission and used by it for establishing mail pay rates, with all expenses directly or naturally assignable to each service being so assigned to the fullest extent possible, and those

not susceptible of direct assignment being apportioned under formulae established by the Interstate Commerce Commission.

Computed as stated above, the operating expenses of plaintiffs' passenger train service for the period here involved, with expense for the fractional years 1931 and 1938 determined by the ratios of the period involved to the entire years, were as follows:

1931 Apr. 1 to Dec. 31	\$233,954
1932 Entire year	277,291
1933 Entire year	253,146
1934 Entire year	248,729
1935 Entire year	217,000
1936 Entire year	242,292
1937 Entire year	254,532
1938 Jan. 1 to Feb. 28	38,752

\$1,706,186

25. In lieu of profits or other compensation above operating costs of mail traffic, the Interstate Commerce Commission adopted a general policy of allowing a percentage of the investment as a factor in determining mail pay rates. In the original *Railway Mail Pay* case of December 23, 1919, the Commission used the rate of 6%; in the second general *Railway Mail Pay* determination of July 10, 1928, the Commission used the rate of 5.75%. The rate of 5.75% was used also in the report of the Commission on May 10, 1933, on plaintiffs' application for a re-examination of rates. Defendant did not introduce any evidence with reference to the reasonableness or fairness of the use of 5.75% on investments chargeable to mail service.

Allocated on the basis of methods prescribed by the Commission, in the first and second general *Railway Mail Pay* cases, the total investments allocated to plaintiffs' passenger train service, represented by net year-end values for the years 1931 to 1937, inclusive, and a 5.75% allowance therefor adjusted for the fractional years 1931 and 1938, are shown in the table following. The amount for 1938 is based on 1937 year-end investments.

Years	Year-end Values of Investments	5.75 percent of year-end values
1931 Apr.-Dec.	\$1,368,085	\$58,986.67
1932	1,366,663	78,583.12
1933	1,305,810	75,084.08
1934	1,284,820	73,877.15
1935	1,034,999	59,512.44
1936	1,034,147	59,463.45
1937	1,127,681	64,841.66
1938 Jan.-Feb.		10,806.91

26. In computing the percentage of the total car-foot miles of passenger train service allocable to the passenger service, baggage and express, and mail, respectively, plaintiffs' evidence omitted from its calculations the car-foot mileage of portions of certain lines which carried passenger, baggage and express, but did not carry mail. Such omissions had the effect of decreasing the percentage allocable to passenger, baggage, and express, and of increasing the percentage allocable to mail. Since the operating expense and amounts of investment of passenger train service were computed on the basis of total car-foot mileage for all lines, an improper ratio is obtained through the computation of space from percentages which do not include certain mileages. In the following table adjustments have been made to include these mileages.

Under the method of allocation established by the Commission in the *Railway Mail Parcels*, and with these corrections, the space necessarily provided for the mail service in relation to the total space operated by plaintiffs in passenger trains for the period here involved, is as follows:

	Percent		Percent
1931.....	22.62	1935.....	19.25
1932.....	27.07	1936.....	17.21
1933.....	23.61	1937.....	18.55
1934.....	48.25	1938, Jan. 1-Feb. 28.....	23.85

27. By applying the percentage of train space allocable to the mail service (finding 26) to the passenger train operating expenses (finding 24) and to the 5.75% allowance on investment (finding 25), the compensation for mail service rendered by plaintiffs during the period here involved, as computed from the space basis method, would be as follows:

Year	Pro rata share of operating expenses	Allowance on investment at 5.75%	Total compensation	Excess of compensation due over actual receipts
1931.....	\$52,920.39	\$13,345.50	\$66,265.89	\$39,453.75
1932.....	64,210.31	21,272.48	85,482.79	50,305.17
1933.....	55,045.77	17,727.35	72,773.12	37,853.03
1934.....	45,393.04	13,482.58	58,875.62	25,099.37
1935.....	41,899.55	11,456.14	53,355.69	26,723.37
1936.....	41,694.79	10,433.66	52,128.45	25,196.38
1937.....	47,215.69	14,030.47	61,246.16	32,178.00
1938, Jan. 1-Feb. 28.....	9,242.35	2,577.46	11,819.81	7,614.78
Totals.....	\$357,611.79	\$101,125.61	\$458,737.40	\$245,113.76



25. The method of allocating space applied in plaintiffs' computation follows that prescribed by the Interstate Commerce Commission in the *Railway Mail Pay* cases, except that with the actual data for the single railroad available, the method has been applied with greater refinement of detail in the allocation of space to the separate service.

This refinement was the determination of space ratios of the passenger, baggage and express, and mail services for each of plaintiffs' different lines and railroad divisions separately. This will be referred to for convenience as the "separate line basis."

A substantially different result will be reached if the used space for each class of service is consolidated for the entire railroad, the totals of unused space similarly consolidated, and the total unused space allocated to the different classes of services on the ratio of the consolidated totals of used space. Such a method will be referred to as the "entire system basis." Defendant contends that the latter is

42 more in keeping with the space basis method established by the Interstate Commerce Commission in the *Railway Mail Pay* cases, since the totals for large numbers of lines reporting were consolidated in those cases, before computing therefrom the average space ratios which formed the basis of the average rates there established.

If the space ratios are computed on the "entire system basis," that is, from the consolidated totals of used space in the combination and mixed cars, in ratio with consolidated totals of unused space in such cars, the following ratios of operating expenses and allowances on investment, and the following amounts of compensation would be obtained:

Mail ratios applicable to the operating expenses and allowance on investments in findings 24 and 25.		Compensation due under entire system method	Excess of compensation due over actual receipts
1931, Apr.-Dec.	19.81%	\$58,033.93	\$31,221.79
1932	22.05%	69,630.40	34,542.66
1933	19.61%	60,443.92	25,523.83
1934	16.66%	53,746.18	20,569.93
1935	16.91%	46,869.86	20,237.54
1936	15.64%	47,182.04	20,460.07
1937	16.59%	52,091.85	26,023.75
1938, Jan.-Feb.	19.94%	9,882.05	5,077.02
Totals		\$397,880.23	\$184,256.59

The \$184,256.59 excess of compensation due under "entire system method" over actual receipts, would offset an operating deficit of \$96,825.93 under existing rates, and would pay \$87,430.66 as return on investment computed at 5.75%.

29. The difference between the results obtained in using the "separate line basis" from those obtained in using the "entire system basis" is due to the fact that on the "separate line basis" the services on each line bear their shares of unused space on that line in proportion to the space used by each service.

On the "entire system basis," unused space in combination or mixed cars is equalized and applied to used space in mixed and combination cars over all the lines. As a result, unused space in a mixed or combination car on one line may be allocated to a service not being performed

43 in the combination car on that line. There were passenger compartments in the combination cars on the branch lines, but no passenger compartments in the combination cars on the main line. By combining the totals under the "entire system basis," some of the unused space on the main line, where there were no passenger compartments in the combination cars, was allocated to the passenger service by reason of being combined with the branch lines where there were passenger compartments in the combination cars.

30. On the branch line between Augusta and Tennille, Georgia, a 15-foot railway mail apartment was authorized for round-trip service only six days per week. The passenger and mail services on this division were discontinued October 15, 1934. In plaintiff's evidence on costs, mail space used on this line was computed on a seven-day-per-week basis. Because no other car was available to provide for the other regularly operated services performed in the combination car, the car containing the mail apartment had to be operated on Sundays, and on the assumption that mail service should be charged with the space provided in the R. P. O. apartment on Sundays which could not be used for other services, plaintiffs included the 7th day in their computations.

If the space for this day were deducted from the used mail space and added to the unused space and allocated under the "separate line system," the following results would be obtained:

Mail ratios applicable to operating expenses and allowance on investment at 5.75%		Total compensation payable	Excess of compensation payable over actual receipts
1931 Apr-Dec	22.23%	\$65,064.08	\$38,991.64
1932	26.08%	84,251.21	49,163.47
1933	23.31%	718,484.43	36,928.34
1934	17.98%	58,004.58	24,828.33
1935	19.25%	53,355.09	26,723.37
1936	17.21%	51,918.35	25,196.38
1937	18.55%	58,254.16	32,178.06
1938 Jan-Feb	23.85%	11,819.81	7,614.78
Totals		\$454,538.31	\$240,444.67

If the same readjustment were made, but the unused space allocated on the "entire system basis," the results would be as follows:

Mail ratios applicable to operating expenses and allowance on investments at 5.75%		Total compensation payable	Excess of compensation payable over actual receipts
1931 Apr-Dec	19.32%	\$56,598.45	\$29,786.31
1932	21.56%	68,083.06	32,953.32
1933	19.24%	59,272.65	24,352.56
1934	16.32%	52,649.32	19,473.07
1935	16.91%	46,869.86	20,237.54
1936	15.64%	47,182.04	20,460.07
1937	16.59%	52,091.85	26,023.75
1938 Jan-Feb	19.94%	9,882.05	5,677.02
Totals		\$392,629.28	\$179,005.64

There is no evidence which indicates that plaintiffs' operating costs were excessive in relation to the character of the road and the traffic area or that such costs were increased by inefficiency, negligence, or uneconomical management or operation by the plaintiffs.

#### OUT-OF-POCKET COSTS

31. Defendant contends that in an action to recover additional compensation upon the ground that an order of the Interstate Commerce Commission fixing a rate for mail pay is confiscatory, the amount of compensation should be based on "out-of-pocket" costs. Out-of-pocket costs are those which can be assigned directly to a particular traffic, and are sometimes called added costs. Stated in another way, they are those costs which would have been saved if the particular traffic had not been handled. Such a system of out-of-pocket costs has never been applied by the Interstate Commerce Commission in the determination of

mail pay rates, but it has been considered by the Commission in some cases where a railroad applied for permission to abandon a segment of a line theretofore in operation.

Defendant's accounting and engineering evidence as to out-of-pocket costs first distinguishes between "variable" and "constant" costs. Variable costs are those which fluctuate, more or less, according to the volume of traffic handled. They are considered under this method as having been influenced by change in the volume of traffic, and where they cannot be directly assigned to a given traffic they are apportioned on a basis of car miles. Constant costs are those which are considered not to have been influenced by change in the volume of traffic, but to have remained relatively unchanged, whether traffic increases or decreases. Being constant, they are eliminated from the computation of out-of-pocket costs for the mail traffic here involved.

When costs cannot be assigned exclusively to either of the constant or variable classifications, they are apportioned between them. For example, defendant's evidence is to the effect that only 44% of the expense of maintenance of way and structures, one of the largest divisions of yearly expense, is constant; similarly, 90% of the expenses of shop machinery in maintenance of equipment is constant, and 50% of the pay of station employees is constant. In like manner, other costs are apportioned between constant and variable.

But not all of the variable costs are considered to be out-of-pocket costs. On the ground that locomotive use is much harder on the roadway than is that of the trailing load, and that the use of the locomotive is more or less of a constant nature, one-half of the variable portion of the expense of maintenance of way and structures has been apportioned directly to locomotives and eliminated from consideration as an out-of-pocket expense of R. P. O. apartment cars. Certain other accounts involving locomotives are similarly treated. The result of the method is demonstrated by the maintenance of way and structures expense for the year 1923 as follows:

Total expense	\$202,027.00
Out-of-pocket portion, 56%	113,135.00
Reduced because of amt. attributed to locomotives, 50%	56,567.50
Allocable to R. P. O. cars in trailing load (3.093% of all car miles)	1,740.00

The R. P. O. car ratio applied to the above account and in most other instances was based on the total car mileages of all cars in the trailing load. In its application to the out-of-pocket portion of many variable costs, however, the R. P. O.



ratio for 1933 was reduced to 2.506% by including the locomotive in computing the total number of cars and by assigning it a value of two cars. The R. P. O. ratio varies slightly year by year, as it is based on actual car mileages.

Defendant's evidence eliminates the closed-pouch service entirely from its conclusions for the reason that no additional car was required for such service, and handling charges were insignificant.

33. While the evidence tends to show that plaintiffs' trains would have had to carry the cars which contained the R. P. O. apartments, even if mail had not been transported, for the purpose of demonstration, but without admitting it as a fact, defendant's evidence proceeds on the assumption that the car containing the R. P. O. apartment could have been omitted from the trains if it had not been required for mail service.

By employing the method described in findings 21 and 22 and assuming that the R. P. O. cars could have been eliminated if mail had not been transported, defendant's evidence tends to show that for the period here involved the out-of-pocket expense of the R. P. O. apartment car service was \$63,477, or approximately 33.42% of the revenue actually received for R. P. O. car service.

Since the closed-pouch service was furnished in cars which would have had to be hauled in any event, the method of out-of-pocket cost calculation above described would show only a negligible amount. For the same reason, if it be assumed that no combination car could be eliminated, even if the mail service were discontinued, out-of-pocket costs would be negligible.

The out-of-pocket cost method takes no account of investment and contemplates no allowance of return thereon.

#### COMPETING RAILROADS

34. Measured by car-foot miles, space furnished for railway post office apartment service was approximately 93% of the total space furnished by plaintiffs for transporting mail during the period involved.

R. P. O. apartment car service could be supplied only by railroad, and the Georgia & Florida Railroad was the only railroad which could furnish R. P. O. apartment car service between the points for which such service was required of plaintiffs by defendant during the period here involved. The evidence shows that lines of certain other railroads operating in the southeastern states crossed the line of the Georgia & Florida Railroad and discharged and received mail traffic at such points of passage from R. P. O. cars or apartments, and that such railroads furnish

ed such services at rates not exceeding those fixed by the Interstate Commerce Commission in the second general *Railway Mail Pay* decision of July 24, 1928. The cost to such railroads for rendering such service is not shown by the evidence. Such railroads will not supply, singly or in combination, reasonably similar R. P. O. apartment service between the points served by plaintiff's railroad.

#### CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiffs are entitled to recover \$186,707.06.

It is therefore adjudged and ordered that plaintiffs recover of and from the United States the sum of one hundred eighty six thousand seven hundred and seven dollars and six cents (\$186,707.06).

#### OPINION

LITTLETON, *Judge*, delivered the opinion of the court:

The railroad for which the plaintiffs are receivers is a common carrier, and, during the period April 1, 1931, to February 28, 1938, here involved, as such a carrier transported mails for the Government (39 U. S. C. 537-539).

The mails were not transported under special contracts, as had been the practice in earlier times, but were carried under and pursuant to the provisions of the Railway Mail Pay Act of July 28, 1916, 39 Stat. 412, on the basis of car-space authorized and distance moved.

This Act provided (*id.*, 429; 39 U. S. C. 541):

"All railway common carriers are hereby required to transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith."

The same Act stated (*id.*, 431; 39 U. S. C. 5631):

"That it shall be unlawful for any railroad company to refuse to perform mail service at the rates or methods of compensation provided by law when required by the Postmaster General so to do, and for such offense shall be fined \$1,000. Each day of refusal shall constitute a separate offense."

Under these, and other statutory conditions, the plaintiffs transported mail tendered by the United States. The tender could not be refused except under heavy penalty, and the terms used in the record to describe such a statutory tender, such as "order" or "authorization" have es-

essentially one meaning which derives its scope, definition and force from the statutory requirements that compelled obedience. The carrier had no choice in the matter. That which protected the carrier was the provision for "fair and reasonable compensation," and, of course, the Fifth Amendment.

The Interstate Commerce Commission was by the statute (39 U. S. C. 542) empowered and directed to establish "rates and compensation" for the mail service, and in doing so was given power as follows (*id.*, 430; 39 U. S. C. 544):

"For the purpose of this section the Interstate Commerce Commission is hereby vested with all the powers which it is now authorized by law to exercise in the investigation and ascertainment of the justness and reasonableness of freight, passenger, and express rates to be paid by private shippers."

In considering the subject of mail pay the Commission was required to hold hearings, of which the interested carriers were to receive notice and give response thereto. The Statute provided (*id.*, 430; 39 U. S. C. 547):

"For the purpose of determining and fixing rates or compensation hereunder the commission is authorized to make such classification of carriers as may be just and reasonable and, where just and equitable, fix general rates applicable to all carriers in the same classification."

The Postmaster General was required (39 U. S. C. 546) to furnish the Commission with necessary data, so that all interested parties were brought together and as well informed as might be.

While the Act left to the Commission the task of classifying the carriers, the Act itself classified the type of service to be compensated for. There were five of these classifications, although two only are here directly involved. These

two are (1) apartment railway post office car service, and (2) closed pouch service. The Act defined apartment railway post office car mail service as service by apartments less than forty feet in length in cars constructed, fitted up, and maintained for the distribution of mails on trains, with two standard-sized apartments, one 15 feet long and another 30 feet in length. Closed-pouch mail service was therein defined as transportation and handling by railroad employees of mails on trains on which full or apartment railway post office cars were not authorized. With exceptions noted, the authorizations for closed-pouch service to be for units of seven feet and three feet in length, both sides of car.

Maximum rates for the service were set forth in the Act. The statutory procedure for the establishment of rates and compensation appears in time to have been complied with, and the Interstate Commerce Commission set up three classifications of railroad mail carriers.

There is some confusion in the record over the denominations of these classifications. The form of annual report prepared by the Commission defines Class I companies as those having annual operating revenues above \$1,000,000, Class II companies as those having annual operating revenues from \$100,000 to \$1,000,000, and Class III companies as having annual operating revenues below \$100,000.

However, classification by the Commission for mail pay purposes was otherwise. One class embraced railroads more than 100 miles in length, another separately operated railroads 50 to 100 miles in length, and another separately operated railroads less than 50 miles in length. Because of its revenues plaintiffs' railroad was, at least for a time, a Class I railroad for reporting purposes, and for mail pay purposes it was classed as a road exceeding 100 miles in length. But the Commission's decision of July 10, 1928, 144 I. C.  $\S$  673, 716, shows that this use of mileage as determining classification was not absolute.

The conversion from a weight basis to a space basis for computing a fair and reasonable compensation for carriage of the mails required investigation and consideration. It must be borne in mind that the space basis was not a matter of tenancy. It was to be used for the purpose of paying for transportation. Transportation was the heart of the matter, and space only a factor in the measure or yardstick used.

50 The Postmaster General devised three formulae for application of the space basis to transportation of the mails. They were termed "plans," and are described in the findings. Plan No. 2 is the one with which we are here concerned for it is the one adopted in substance by the Interstate Commerce Commission, and it was on the basis of that plan that rates were derived for transportation of the mails.

All this, of course, required an extended investigation both on the scene of operations throughout the country, and in the responses and the reports made by the carriers to the Commission from time to time.

Since this was a comparatively new undertaking it was found necessary by the Commission to group and to generalize. To establish individual, specific rates from point to point would have been a stupendous proposition. Innumerable rates on freight from point to point were already in effect, but they were a growth of many years and founded



on decades of experience. It is obvious that if all freight tariffs were destroyed and rate experts and all others utterly forgot what was in them, the establishment of new freight rates could not be accomplished in short order. A sizable proportion of the mails had come to be the parcel post and this naturally included articles theretofore carried by the railroad originally as freight. The consequent substitution of mail pay in place of freight collections could not justify undue decrease of earnings.

The task before the Interstate Commerce Commission in establishing mail pay was simplified by the scheme or plan authorized by Congress to group the railroads by class. The plaintiff's railroad was some 400 miles in length, that is to say over 100 miles, and it was therefore placed in the same class as the major railroads of the country. For reasons which will hereinafter appear we have little if any criticism to make of this classification. It may have been too arbitrary and too general, but we cannot revise it. We are not informed as to why the division line of 100 miles was adopted rather than some other line of cleavage. But it was not a sliding scale.

After hearings upon the matter thus authorized by Congress to be investigated and passed upon, the Interstate Commerce Commission came to a decision December 23, 1919, which is reported 56 I. C. C. 1, being given docket No. 9200.

By this decision the Postmaster General was required to use the space basis on all steam railroads, and for roads in whose class plaintiff's railroad was placed the Commission found that the fair and reasonable rates of payment for transportation of mail matter as of November 1, 1916, and to January 1, 1918, were 10 cents per mile of service by a 15-foot apartment car and 3 cents per mile of service by a 3-foot closed pouch space. There were other space rates prescribed, of course, but here we are concerned with a 15-foot apartment and a 3-foot closed-pouch space. After January 1, 1918, the rates were to be 25 percent additional, bringing those here involved to 12.5 and 3.75 cents respectively. These rates remained in effect for some time, until the railroads asked for a re-examination.

On July 10, 1928, upon a re-examination, the Commission raised the rates for roads of plaintiff's class by 15 percent, so that the rates of 12.5 cents on 15-foot apartment cars were raised to 14.5 cents per mile, and 3.75 cents on closed-pouch service to 4.5 cents per mile. These were prescribed as fair and reasonable rates to be received on and after August 1, 1928, for all roads of plaintiff's class. This determination was carried under the original docket number 9200, and is published 144 I. C. C. 675.

The plaintiffs became dissatisfied with the operation of these rates and on April 1, 1931, applied to the Commission for a re-examination and redetermination of rates as they affected the Georgia & Florida Railroad and asked for the establishment of fair and reasonable rates. Thus the plaintiffs could do under the Act of July 28, 1916, 39 Stat. 412, 430; 39 U. S. C. 553.

An investigation was made and the Commission came to a decision in the matter May 10, 1933, docket No. 9200, 192 I. C. C. 579, denying increased compensation.

In all these investigations Plan No. 2 was adhered to. The plaintiffs petitioned for a reconsideration, which was denied October 3, 1933.

Thereafter, March 3, 1934, the plaintiffs commenced an action in equity in the District Court of the United States for the Southern District of Georgia, Augusta Division, in which they sought a decree setting aside the

Commission's order of denial and requiring further proceedings. They were successful in this action and on March 12, 1935, the Commission reopened the case. Decision was rendered February 4, 1936, 214 I. C. C. 66, docket No. 9200; in which the Commission adhered to its former position and denied the application. The only additional matter introduced in evidence at that hearing appears to have been certain rules governing the separation of operating expenses between freight and passenger services.

The plaintiffs thereafter filed a supplemental petition with the District Court seeking to set aside the Commission's order of February 4, 1936. On February 23, 1937, the District Court set aside the order and the Interstate Commerce Commission and the United States prosecuted an appeal therefrom to the United States Supreme Court, *United States et al. v. Griffin et al.*, 303 U. S. 226.

The Supreme Court reversed the decree of the District Court on the ground that the District Court lacked jurisdiction. The case had been heard in the District Court by three judges under the provisions of the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208. The Supreme Court held (303 U. S. 226, 233) that as respects the Interstate Commerce Commission, injunctive relief applied only to orders of such public importance and widespread effect as to justify the extraordinary features of the Urgent Deficiencies Act, and that there was not in the case before them, such importance and effect. The Supreme Court concluded with the following language:

*Fourth.* The absence in the Railway Mail Pay Act of a provision for judicial review and the denial of jurisdiction under the Urgent Deficiencies Act do not preclude every

character of judicial review. If the Commission makes the appropriate finding of reasonable compensation but fails, because of an alleged error of law, to order payment of the full amount which the railroad believes is payable under the findings, the Court of Claims has jurisdiction of an action for the balance, as the claim asserted is one founded upon a law of Congress. *Missouri Pacific R. Co. v. United States*,

271 U. S. 323. Compare *United States v. New York Central R. Co.*, 279 U. S. 73, affirming 65 Ct. Cl. 115, 124.<sup>10</sup> And since railway mail service is compulsory,

the Court of Claims would, under the general provisions of the Tucker Act, have jurisdiction also of an action for additional compensation if an order is confiscatory. *United States v. Great Falls Mfg. Co.*, 112 U. S. 645; *North American Transportation & Trading Co. v. United States*, 253 U. S. 330, 333; *Jacobs v. United States*, 290 U. S. 13, 16. Moreover, as district courts have jurisdiction of every suit at law or in equity arising under the postal law, 28 U. S. C., § 41 (6), suit would lie under their general jurisdiction if the Commission is alleged to have acted in excess of its authority, or otherwise illegally. Compare *Powell v. United States*, 300 U. S. 276, 288, 289. But a suit under the Urgent Deficiencies Act to set aside an order concerning mail pay is not primarily one against the Commission. Primarily, it is a suit against the United States.<sup>11</sup> And the United States can be sued only when authority, so to do has been specifically conferred.

"The Railway Mail Pay Act does not confer that authority."

But this is not the first case where these dual or alternative grounds for jurisdiction were considered.

In *New York Central Railroad Co. v. United States*, 65 Ct. Cls. 115, affirmed on appeal, 279 U. S. 73, which was a suit for mail pay as fixed by the Interstate Commerce Commission from the date of filing of application with that commission for readjustment of compensation, this court took jurisdiction because the carrier was "asserting a claim founded upon a law of Congress." The Act of July 28, 1916, 39 Stat.

<sup>10</sup> Other decisions of the Court of Claims under the Railway Mail Pay Act of 1916 are: *Chicago & E. I. Ry. v. United States*, 63 Ct. Cl. 585; *Navajo County v. G. R. Co. v. United States*, 65 Ct. Cl. 327; *Chicago & E. I. Ry. Co. v. United States*, 72 Ct. Cl. 497; *Macon D. & S. R. Co. v. United States*, 78 Ct. Cl. 251, 79 Ct. Cl. 298. Compare *Perc Marquette Ry. Co. v. United States*, 59 Ct. Cl. 538; *New Jersey & N. Y. R. Co. v. United States*, 80 Ct. Cl. 243.

<sup>11</sup> Compare Judicial Code, § 211, 36 Stat. 542, 1156, as amended, 38 Stat. 219, 28 U. S. C. § 48; *Lambert Run Coal Co. v. Baltimore & Ohio R. Co.*, 258 U. S. 377, 382.

412, was involved as here. But with reference to the power and jurisdiction of the Commission this court said: Congress "erected a tribunal or accepted one already in existence to discharge a duty which was judicial in its nature, the ascertainment of reasonable compensation to carriers for services exacted by statute."

54 citing *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 327, to the effect that when a taking has been ordered, then the question of compensation is judicial.

Following the decision in *United States v. Griffin*, *supra*, February 28, 1938, the plaintiffs herein filed their original petition February 1, 1942, and amended petition December 28, 1944.

The plaintiffs sue for the principal sum of \$252,061.63 which they say represents the difference between the mail pay they received for the period April 1, 1931, to February 28, 1938, both dates included, and fair and reasonable compensation for the services rendered.

The defendant argues that the above-quoted statements of the Supreme Court are obiter. We do not think they are, but even so, what is said by way of obiter may nevertheless be good law.

A deficit in net railway operating income from the carrying of the mail is, on its face, confiscatory. That must be conceded. It is a simple proposition that needs no support and must be accepted as obvious. But, if we correctly read the decision of the Commission in the plaintiffs' case, reported in 192 I. C. C. 779, *supra*, the Commission's position is that the deficit of \$4,945 is a "computed" deficit, not necessarily an actual deficit, and therefore not to be taken as "confiscatory," although the Commission does not use that term.

The trouble with this argument is that a deficit in net railway operating income from mail is always necessarily "computed." Actual loss or actual deficit in such income is an *ignis fatuus*. This must be so until the method of arriving at a deficit receives authoritative if not common acceptance. The Postmaster General himself proposed three alternative plans which itself indicates lack of an absolute rule.

Senate Document No. 63, 78th Congress, 1st Session, entitled "Letter from the Chairman, Interstate Commerce Commission, transmitting in response to Senate Resolution No. 119, certain information on rail freight service costs in the various rate territories of the United States," states in the letter of transmittal, June 7, 1943, that the Commission had not yet had opportunity to pass judgment upon the cost figures contained in the study.



At a hearing on this case by a commissioner of this court February 18, 1946, a witness for the defendant, the Chief of Section, Cost Section of the Bureau of Transport Economics and Statistics, who was acknowledged in Senate Document No. 63 as especially contributing in the preparation of the cost study, stated, in response to a direct question as to whether the present cost formulae were much better than the cost formulae used by the Commission in 1928 or in 1931:

"Well, in 1928 and 1931 the Commission did not have really any cost formulae. They still haven't got any cost formulae, but the Cost Section was formulated for the express purpose of determining cost formulae for that they might be used by the Commission in gathering costs and might be distributed to the carriers so they would have means and procedures for gathering those costs. \* \* \*

We thus see that ascertainment of "actual" as applied to plaintiffs' cost in the transportation of the mail, had no prospect of realization. The cost had to be a "computed" cost in any event. But had we the actual cost it would serve only as a guide, a cost to be considered, but not necessarily to govern, in arriving at fair and reasonable compensation. The question is, rather: What is the fair and reasonable cost? For we cannot proceed from an unfair and an unreasonable cost toward a fair and reasonable compensation.

Here, however, it is found that "there is no evidence which indicates that plaintiffs' operating costs were excessive in relation to the character of the road and the traffic area, or that such costs were increased by inefficiency, negligence, or uneconomical management or operation by the plaintiffs."

Nowhere in the Commission's findings or conclusions in plaintiffs' case do we find even an intimation that the so-called "actual" cost, whatever it might be, was anything but fair and reasonable. What we do find is that, on the facts as found and stated by the Commission, there is an erroneous conclusion of law by the Commission that plaintiffs have been fairly and reasonably compensated for their mail service. Cf. *Case, et al. v. Los Angeles Lumber Products Co., Ltd.*, 308 U. S. 106, 114-120.

56 The so-called "computed" cost being the only cost that can be used, it must be fairly and reasonably computed. To what extent it approaches a fair and reasonable cost not in excess of actual cost is a matter not yet within the ability of the Commission to determine. It is a question that must be answered by good judgment, by those peculiarly fitted and equipped to ascertain the requisite facts as to such cost and exercise that judgment. Congress

has chosen the Interstate Commerce Commission to perform that function, and it has done so.

As the Supreme Court has said, this Court has jurisdiction to render judgment of recovery for an amount sufficient to constitute fair and reasonable compensation under the facts as found by the Commission, unpaid through failure of the Commission, because of an error of law, to order payment thereof.

Under finding 16 herein, it is shown that the Interstate Commerce Commission found and determined that plaintiff would require an increase in its mail revenue of 87.4% in order to secure for itself, under Plan 2 adopted by the Commission, a return of 5.75% theretofore fixed by the Commission, on its investments in road and equipment engaged in mail-traffic. This determination was based on the calendar year 1931 test period. The Commission's findings were determined upon an apportionment of passenger equipment used for mail-traffic on the basis of space hired or required for carrying the mail.

Railroad expenses are not generally applicable as direct costs but require apportionments. The Commission did not, under Plan 2, which it adopted and which we must accept, determine actual costs of various operations. For the year 1931 the total operating costs of plaintiffs' road were found to be \$1,449,801. Of this sum 21.74%, or \$315,273, was determined to be apportioned to passenger train service in which the mail traffic was served. Based upon the space used or hired, the Commission determined total expenditures applicable to the mail service of \$40,673. As against these expenditures, the plaintiffs' road had a deficit in this test period of \$4,945, which indicates that its gross mail revenues were \$5,728. In other words, the mail revenues were \$4,945 less than the operating expenditures applicable to the mail service, which resulted in such deficit.

57 The Commission then determined that of the total investments in the road (rails and bed), 21.48% was apportioned to the passenger train service with a value of \$3,401,578. On the basis of mail space used or hired by the United States, the passenger train road investment of \$438,803 was applicable to the mail traffic.

In addition to the road investments, the Commission found that approximately 10% of the total investments in equipment was applicable to the passenger train service amounting to \$135,257; and that the mail traffic required \$18,279 of the investment in this passenger train equipment.

By adding the road investment of \$438,803 and the equipment investment of \$18,279 applicable to the mail traffic, it

was determined that the total investment by the carrier in road and equipment devoted to the mail service was \$457,082.

At a return of 5.75% on the total investments apportioned for mail traffic of \$457,082, it was found that a net income of \$26,282 for carrying the mails would be required for the test period 1931. Since the carrier operated at a deficit of \$31,227 for mail traffic in 1931, this deficit would have to be taken care of in an increased allowance of \$31,227 to result in a net income of \$26,282 (finding 16).

The required increase of \$31,227 in mail revenue is, as found by the Commission, 87.4% of the actual gross mail revenue received during 1931 ( $\$31,227 \div \$35,728 = 87.4\%$ ).

The table in finding 23 herein shows first, the mail revenue received by years or fractions of years covered by the period involved herein and, second, the increase required at 87.4% of such gross revenues received to overcome and avoid the deficit. These increases for the years involved, under the findings of the Commission, total \$186,707.06.

The commissioner to whom this case was referred for the taking of testimony and the making of a report thereon has in his report included certain findings which, in the final analysis, do not directly determine the outcome of this suit, but we have retained and adopted them in our special findings of fact because they give background and illustrate the problem that was, and, for that matter, apparently still is before the Interstate Commerce Commission. They demonstrate, we think, one reason at least that Congress confided to the Commission the judicial task of determining fair and reasonable compensation. The use of the space-basis

58. system for paying transportation required consideration of the question in what proportion, if any, baggage, freight, express, passenger, mail-service should pay for space unused, in fact what should constitute unused space. There is in the record some distinction made between "unused" and "unoccupied" space. The quantities of baggage, express, and mail inevitably varied, and for practical reasons the space available would have to be ordinarily more than that physically taken by the cargo. Conceivably, also, there had to be space for handling of the cargo. Students of cost allocations or apportionments were not altogether sure as to their methods. The "out-of-pocket" or "added" cost theory has been injected into the case (findings 31-33), but we are not convinced that additional service is in any different situation than the service to which it is an addition, as far as computing fair and reasonable compensation is here concerned. We think there

is just as good reason for considering express as the added service rather than the mail. The fact that a carrier is only too glad, perhaps anxious, to carry mail to help cover other wise wasted floor space, is understandable. But that is no reason why the mail should be carried at "bargain" rates. A passenger who goes aboard a train after the coach has already accumulated a paying load, must nevertheless, and rightly so, pay full fare, along with all the rest. *C. Fred R. Conib Co. v. United States*, 103 C. Cls. 174, 183. We do not say that the added cost or out-of-pocket theory, with its implications, is inapplicable in all cases. But the theory, if we are to believe the witnesses, has not matured into practice in the determination of mail pay.

In view of the record presented the basis employed by the Interstate Commerce Commission, that is to say Plan No. 2, appears to be fair and reasonable. The studies made are in no wise shown to be out of line with the then state of the art, science, or profession of statistical analyses and cost accounting.

The deficit found in plaintiffs' mail operations was ascertained according to the formula suggested by the Government and used by the Commission to prescribe rates for general application. As we have pointed out, the ascertainment of fair and reasonable compensation must proceed from a fair and reasonable basis. The Commission has, by its use of Plan No. 2, adjudged it to be a fair and reasonable basis. And out of that basis there has been ascertained, by formulae prescribed by the Commission, what is the fair and reasonable compensation for plaintiffs' carriage of the mails beginning the first of April 1931, and ending at the close of February 1938. Fair and reasonable compensation cannot be both a deficit and the amount of \$186,707.0660 found. It is, we conclude, the latter.

The Commission's decision of May 10, 1933, 192 I.C.C. 779, states its position with reference to plaintiffs' claim as follows:

"The cost study is not considered to be an accurate ascertainment of the actual cost of service. It is an approximation to be given such weight as seems proper in view of all the circumstances. See *Railway Mail Paid*, *supra*. The comparison of mail revenue with other revenue received for services in passenger train operations shows that mail with relation to the other services is bearing its fair share of the expenses of operation and is contributing relatively more than the other services for the space furnished. Applicant receives the same rates as those received by other roads for the same kind of service. Many of these other roads



are, as applicant points out, roads which are very much larger and which have greater traffic and lower unit operating costs. On the other hand many are in much the same situation as the applicant in respect of passenger train operations. The data submitted fail to justify giving the applicant rates higher than those now paid other railway common carriers for like services.

We quote rather than paraphrase this, for what it says is important. We are of the opinion that the "approximation" should be given greater weight than the Commission affords it, because, as we have said and the Commission in effect admits, there is no such thing as certainty in actual cost. Approximate, or as it is called, "computed" cost must be relied upon, and a matter of law must be decisive. There is no alternative, at least no satisfying alternative. Of course there were other methods of computing cost, but the Commission, put to the choice, selected Plan No. 2. And it did not, in the decision of May 10, 1933, abandon Plan No. 2 and select another.

The fact that the plaintiffs' railroad "receive the same rates as those received by other roads for the same kind of service," is not responsive to the plea that those rates, as to the plaintiffs, are confiscatory. The service is compulsory, economy and efficiency of operation are undisputed. This is not a case where the carrier may cut down its expenses and thus convert the remuneration into one that is fair and reasonable. It has already reached the efficient and economical stage, and if it must carry the mail, the remuneration must fit that situation. Here it has not done so.

We cannot agree that the basis of compensation is to be governed by the added or out-of-pocket cost theory. It was not applied in Plan No. 2, as that plan is explained to us, and we cannot find that plan grossly erroneous. The plan applied to a group gave certain rates, but the rates good for the group did not fit plaintiffs' road. The plan applied to the plaintiffs' road gave higher rates than to the average road and are the only rates presented in the Commission's decisions that give the plaintiffs fair and reasonable compensation. The plaintiff here are entitled to them. The average road has no physical existence and the general rates put into particular effect would mean greater or less compensation for the individual carrier. But the governing statute was careful to make provision whereby the rates might not be confiscatory for any one road.

The plaintiffs were not in a bargaining position. It was unlawful for them to refuse "to perform mail service at the rates or methods of compensation provided by law," etc.

The duty of the Commission extended beyond that of establishing rates. The statute went further and required the Commission to fix fair and reasonable compensation to the individual carrier. It had to be the individual carrier, for otherwise the term "compensation" is meaningless. Only in the event that they were "just and equitable," could the Commission "fix general rates applicable to all carriers in the same classification." 39 Stat. 412, 430. Rates are not just and equitable that give one carrier a net revenue and impose upon another carrier in the same class, a deficit.

The rates authorized by the Commission were based on a grouping together and then given particular application without change. It did not follow that rates, fair and reasonable for an average road (which in fact did not exist), would be fair and reasonable for all existing roads. The

statute required more than mere rates, it required 61 fair and reasonable compensation, and the duty of fixing upon and authorizing payment of fair and reasonable compensation in any particular case could not be avoided because of the magnitude of the task, or because some other methods of calculation, which, although neither approved nor adopted, might possibly give other results.

There is no presumption that the average is true of the particular. The presumption is otherwise, and the plaintiffs, having shown their railroad to be in a comparatively low scale, and thus distant from the average, had no great burden of proof before them in presenting their case to the Commission. It was for the Commission to demonstrate that the general rates prescribed gave the plaintiffs a fair and reasonable return. This the Commission failed to do. More than that, the Commission has by its findings, using its adopted plan and its own methods as applied to plaintiffs' circumstances, proved that plaintiffs have been underpaid, \$186,707.06 in fair and reasonable compensation for the period in question. See Finding No. 23.

If that which the Commission determined is fair and reasonable compensation for the representative road, it must, we think, be fair and reasonable for any one road that is so represented. The reasons given by the Commission for not ordering payment, on the basis of its findings, of the annual sums making up the above total of \$186,707.06, are not convincing or even persuasive. In our opinion they all overlook the statutory mandate that the compensation to be allowed for carrying the mails must be reasonable, and the constitutional one that it must be just.

There is the question as to the statute of limitation, Section 156 of the Judicial Code, U. S. C., Title 28, § 262. Under that statute, a claim is barred unless the petition is filed

“within six years after the claim first accrues.” The time when the claim can be definitely ascertained and set on goes: *Thayer v. United States*, 191 U. S. 294, 296.

Since the determination of fair and reasonable compensation was confided by Congress to the Interstate Commerce Commission, the amount of the claim was not ascertainable until the Commission had given its final determination. This date was February 4, 1936, 214 U. S. 66. It is true that the Commission reopened its docket No. 9200 under the decree of a district court, which was thereafter held by the Supreme Court to be without jurisdiction over the complaint, but the Commission did in fact reopen the case, considered it on the merits, and did in fact thereupon render its final decision in the matter, affirming its previous holding.

The six-year statute of limitation therefore began to run February 4, 1936. Since the original petition was filed herein February 2, 1942, the claim is within the statute. That the claim relates back to the filing of the application with the Commission has been held by the Commission, by this Court, and by the Supreme Court, *Railway Mail Pay*, 144 U. S. 675, 717, and *New York Central Railroad Co. v. United States*, 65 U. S. 115, 124 ff., a decision which antedated that of the Commission, and which was affirmed by the Supreme Court, 279 U. S. 73.

The final question relates to plaintiffs' claim for the allowance of interest on the principal sum recoverable, not as interest but as a part of, and to make just compensation complete and entire. It is true that the basic Act of Congress makes use of the terms fair and reasonable compensation, just and equitable. But in *United States v. Thayer-West Point Hotel Co.*, 329 U. S. 585, the Court refused to assign a technical and absolute meaning to the term “just compensation,” and this court, in the *New York Central* case, *supra*, which involved, as here, “fair and reasonable compensation” for compulsory carriage of the mails, stated: “We do not think the plaintiff can have judgment for interest on the deferred payments. We are not determining just compensation but are giving effect to an authorized order of the Interstate Commerce Commission. In such case the statute forbids the allowance of interest. Sec. 177, Judicial Code, as amended. Cases cited in *Lauritt & Myers Co.* case, 61 U. S. 693, 704.”

Here, also, we are giving effect to an order of the Interstate Commerce Commission as properly construed and not determining compensation in an original proceeding under the Fifth Amendment.

Plaintiffs are entitled to judgment in the sum of \$186,707.06, and it is accordingly so ordered.

HOWELL, Judge; MADDEX, Judge; WHITAKER, Judge; and JONES, Chief Justice, concur.

63. *Judgment of the Court*

At a Court of Claims held in the City of Washington on the 5th day of April, A. D. 1948, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiffs are entitled to recover \$186,707.06.

IT IS THEREFORE ADJUDGED AND ORDERED that plaintiffs recover of and from the United States the sum of one hundred eighty-six thousand seven hundred and seven dollars and six cents (\$186,707.06).

65. *Proceedings after Entry of Judgment*

On May 19, 1948, the defendant filed an application for transcript of record on petition for writ of certiorari which is as follows:

*To the Clerk of the Court of Claims:*

Defendant intends to file in the Supreme Court of the United States, within the statutory period and without unnecessary delay, a petition for a writ of certiorari to review the judgment of the Court of Claims in this case. Application is hereby made for a certified transcript of the record, to include the following:

1. The pleadings, the findings of fact (including all documents incorporated by reference therein), conclusion of law and judgment and opinion of the Court;

2. The portion of the typewritten transcript of evidence which defendant deems material to the errors assigned, together with Defendant's Exhibits 1, 2, 3, 7, 8, 9, and 25, an original and five copies of which are filed herewith;

3. This application and all orders hereinafter issued by the court with reference thereto.

Respectfully requested.

(S) H. G. MORISON

H. G. Morison,

*Assistant Attorney General*

OTHER PARTS OF THE RECORD AS NOTED ABOVE ACCOMPANY THIS RECORD UNDER SEPARATE COVER.

67. *Order of the Court Settling and Approving Transcript of Record on Petition for Certiorari*

The defendant having presented to the court the within transcript from the original record of the court in the above entitled case as that portion material to the errors



assigned in its application for record on petition for certiorari, and the plaintiff having made no objection thereto, the court upon consideration thereof finds the transcript to be an accurate statement of the portions of the original record material to the errors assigned, and orders the same on this fourth day of June, A. D. 1948, SETTLED and APPROVED.

By the Court,

ST. MARYS JONES,

Chief Justice.

69 Clerk's Certificate to foregoing transcript omitted in printing.

70 *Motion for Substitution of Parties Plaintiff*

On June 30, 1948, plaintiff made a motion for substitution of Alfred W. Jones, Receiver for Georgia & Florida Railroad as party plaintiff in these proceedings in place of William V. Griffin, and Hugh W. Purvis, Receivers for Georgia & Florida Railroad.

On July 9, 1948, the above motion to substitute parties plaintiff was allowed by the court.

71 In the Court of Claims of the United States

WILLIAM V. GRIFFIN AND HUGH WILLIAM PURVIS  
RECEIVERS FOR GEORGIA & FLORIDA RAILROAD, PLAINIFFS  
No. 45422

v.

THE UNITED STATES, DEFENDANT

*Portions of Transcript of Evidence Designated by Defendant for the Purpose of Filing a Petition for a Writ of Certiorari in the Supreme Court*  
and

*Portions of Transcript of Evidence Designated by Plaintiff for the Purpose of Filing a Petition for a Writ of Certiorari in the Supreme Court*

L. O. Todd, a witness produced by the plaintiffs, having been duly sworn, testified on November 2, 1944 as follows:

Page 25 Direct Examination by Mr. Herr:

Q1. Mr. Todd, will you please state your name and address?

A. My name is L. O. Todd. I reside in North Augusta, South Carolina.

Q2. Will you please state what your position is?

A. I am Assistant to the Receiver and General Manager and Chief Accounting Officer for the Receivers of the

Georgia & Florida Railroad Auditor and Assistant Secretary of the Georgia & Florida Railroad, a corporation and Secretary and Auditor of the Statesboro Northern Railway.

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*Page 32:* On November 1, 1917, I was employed by the Receivers of the Georgia and Florida Railway, predecessor of the Georgia & Florida Railroad, as a Clerk in the Accounting Department; was promoted to Assistant Bookkeeper on July 1, 1918; to Chief Clerk to Superintendent Motives Power on November 16, 1919; to Division Accountant March 8, 1920, and was appointed Assistant Auditor on November 1, 1923. I was elected Auditor and Assistant Secretary of the Georgia & Florida Railroad by the Board of Directors on January 31, 1929, and when Receivers were appointed on October 19, 1929, I was appointed Auditor for the Receivers and was promoted to my present position on April 16, 1931. I have been responsible for the Statistical work on the Georgia & Florida Railroad since I was appointed Assistant Auditor on November 1, 1923.

As Auditor for the Receivers, I testified for the petitioners in the proceedings before the Interstate Commerce Commission, as set out in the stipulation of the transcript of record filed in the Supreme Court of the United States on April 16, 1937, and printed in the record in Case No. 63, October Term, 1937, United States of America and Interstate Commerce Commission, Appellants, vs. W. V. Griffin and J. W. Purvis, Receivers for Georgia & Florida Railroad, 303 U. S. 226, 239, 82 L. Ed. 764.

*Page 1:*

The Receivers operating the Georgia & Florida Railroad as a railway common carrier have been required under the Railway Mail Pay Act of July 28, 1916 (U. S. C. A. Title 39, Sections 523 to 568, inclusive) to transport, and have transported, mail matter offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General from and before April 1, 1931, to and since February 28, 1938, under so-called orders of authorization upon which is termed a space basis from April 1, 1931, to February 28, 1938.

The significance of the date April 1, 1931, is that was the date on which the Receivers filed their petition with the Interstate Commerce Commission asking for a reexami-

nation of the rates of mail pay compensation, thereby giving notice that the rates of mail pay theretofore paid would no longer be accepted as sufficient to provide just and reasonable compensation for the use of the property being taken.

The significance of the date February 28, 1938, is that was the date on which the Supreme Court of the United States handed down its decision in No. 65, October Term, 1937, United States of America and Interstate Commerce Commission vs. W. V. Griffin and H. W. Farvis, Receivers for Georgia & Florida Railroad, 303 U. S. 226-239.

The present suit on the claim of the Receivers was confined to that period, and further claim for the subsequent period has been reserved.

On the first day of April, 1931, the Receivers filed their application with the Interstate Commerce Commission, designated as "Railway Mail Pay, in the Matter of the Application of the Georgia & Florida Railroad Company for Increased Rates of Pay", being a part of No. 9200 on the formal docket of the Commission, alleging that the rates being received for the transportation of the mails were not fair and reasonable, and requesting the

*Panel* to re-examine the facts and circumstances surrounding such transportation and to fix and determine fair and reasonable rates to be received for services rendered on and after said April 1, 1931. A hearing was duly had thereon, at which the applicants therein and the Post Office Department were given an opportunity to present evidence and be heard, and did, among other matters and things, present a study which showed the cost to the Receivers of transporting the mails, which study was jointly made and agreed to by said Receivers and the Post Office Department. After said hearing briefs were filed, the Examiner thereafter submitted a proposed report, and the case was orally argued before Division 5 of the said Commission.

Thereafter, on the 10th day of May, 1933, said Division 5 of the Commission handed down the report of the Commission in said cause (192 I. C. C. 779), and also a certain order was made and entered in that proceeding on the 10th day of May, 1933.

Thereafter, on July 6, 1933, said applicants filed their petition for a reconsideration in said cause, and the said Commission on the 3rd day of October, 1933, by its order entered on that date in said cause, denied the petition for reconsideration.

Page 8:

The WITNESS: The Receivers thereafter, on March 2, 1934, duly filed their petition in the United States District Court for the Augusta Division of the Southern Judicial District of Georgia, in Equity No. 207, seeking to have said order and decree of the Commission of the 10th day of May, 1933, perpetually set aside, suspended and annulled, and following the hearing by the Court, an order of injunction was issued and opinion filed January 18, 1935.

Thereafter, the Interstate Commerce Commission by its order of March 12, 1935, reopened the said proceedings in said Docket 9200 "Railway Mail Pay, In the Matter of the Application of the Georgia & Florida Company for Increased Rates of Pay".

Thereafter, following the filing of briefs and the hearing of oral argument, the Interstate Commerce Commission, *Page 9:*

on February 4, 1936, rendered its report on further hearing (214 I.C.C. 66).

Thereafter, on June 20, 1936, the Receivers filed a supplemental petition in the United States District Court for the Augusta Division of the Southern Judicial District of Georgia, in Equity No. 228, Supplemental to Bill in Equity, No. 207, seeking to perpetually set aside, suspend and annul said order of the Commission of the 4th day of

76 February, 1936. A hearing was had at which was presented the entire record before the said Commission upon the reopening of said proceeding, and at which no other evidence was introduced, and on February 22, 1937, a three judge Court decreed that said order of the Interstate Commerce Commission of February 4, 1936, be set aside and annulled and that said Commission should take such further action in the premises as the law requires in view of the annulment and setting aside of said order.

Thereafter, on May 15, 1937, the United States of America and the Interstate Commerce Commission perfected an appeal to the Supreme Court of the United States from said order of the United States District Court for the Augusta Division of the Southern Judicial District of Georgia. Upon said appeal the question of jurisdiction of the specially constituted Three Judge District Court was for the first time raised, and on December 13, 1937, the Supreme Court indicated that the

*Page 10:*

said specially constituted Three Judge Court had jurisdiction, but in its decision handed down on February 28, 1938, (303 U.S. 226), determined that the remedy provided by the



Urgent Deficiencies Act, of October 22, 1913, Chapter 32, 38 Stat. 208, 210, 220, was not applicable to said order of the Interstate Commerce Commission.

During the entire period from April 1, 1931, to February 28, 1938, the Receivers have furnished railway mail service to accommodate the United States mails in compliance with commissions and orders of the Postmaster General. A 15-foot apartment has been furnished upon requisition by the Postmaster General, for which the Receivers have been paid for the entire period from April 1, 1931, to February 28, 1938, at the rate of 14.5 cents per mile. Three foot closed pouch service has also been furnished upon requisition of the Postmaster General, for which the Receivers have only had pay for the entire period from April 1, 1931, to February 28, 1938, at the rate of 4.5 cents per mile.

During the period from April 1, 1931, to February 28, 1938, the Receivers received the following amounts for 15-foot apartment service:

\$23,477.34 for the period from April 1, 1931 to December 31, 1931

\$31,227.47 for the year ended December 31, 1932

\$31,078.04 for the year ended December 31, 1933

Page 11:

\$29,518.95 for the year ended December 31, 1934

\$23,593.98 for the year ended December 31, 1935

\$22,632.06 for the year ended December 31, 1936

\$23,569.99 for the year ended December 31, 1937

\$3,799.29 for the period from January 1, 1938 to February 28, 1938.

During said period from April 1, 1931, to February 28, 1938, the Receivers received the following for 3-foot closed pouch service at the rate of 4.5 cents per mile:

\$2,469.85 for the period from April 1, 1931, to December 31, 1931

\$3,221.28 for the year ended December 31, 1932

\$3,206.35 for the year ended December 31, 1933

\$3,045.30 for the year ended December 31, 1934

\$2,426.54 for the year ended December 31, 1935

\$2,454.02 for the year ended December 31, 1936

\$2,447.16 for the year ended December 31, 1937

\$392.28 for the period from January 1, 1938, to February 28, 1938.

For the period from April 1, 1931, to February 28, 1938, the Receivers have been paid by the United States Government for transportation of mail at the rate of 14.5 cents per mile for service furnished by the Receivers in 15-foot railway postoffice apartment units, and at the rate of 4.5

cents, per mile for service furnished by the Receivers in 3-foot closed pouch units.

The Receivers claim they are entitled:

*Page 12:*

to receive from the United States Government for the period from April 1, 1931, to February 28, 1938, compensation at the rate of 27.47 cents per mile for the transportation of the mails in 15-foot railway postoffice apartment units, and at the rate of 8.33 cents per mile for service furnished by the Receivers in 3-foot closed pouch units.

No action has been taken on this claim by Congress or by any of the Departments, Boards or Commissions of the United States Government other than above stated, further than that a petition filed with the Interstate Commerce Commission on February 1, 1944, for reopening, rehearing and reconsideration was denied by that Commission on March 6, 1944.

Said claim has not been assigned or transferred in whole or in part. The Receivers are citizens of the United States and have at all times borne true allegiance to the Government of the United States; and have not in any way  
79 voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

Mr. Rood: Counsel desires to reserve the right of cross examination for later.

Mr. Hitt: The record will show we reserve the right to put Mr. Todd on again later.

The Commissioner: Yes, Mr. Todd will be recalled at a later time.

On December 18, 1944 Witness Todd resumed his testimony as follows:

By Mr. Hitt:

*Page 16:*

Q3. Mr. Todd, were you a witness in the hearings before the Interstate Commerce Commission in the proceedings resulting from the petition of April 1, 1931, by the Receivers of the Georgia & Florida for a re-examination of the rates of mail pay in I. C. C. Docket No. 9200?

A. Yes.

Q4. Were you present when all the other witnesses testified in the hearing before the Interstate Commerce Commission?

A. Yes, there were two hearings, and I was present at both throughout the entire time of those hearings and heard all the witnesses.

Q5. Do you know the history of the proceedings before the Interstate Commerce Commission and in the three-judge Federal Court for the Southern District of Georgia, and before the Supreme Court of the United States?

A. Yes, I was currently informed on all developments as they occurred.

Q6. Have you an exhibit which sets forth the essential proceedings before the Interstate Commerce Commission and the three-judge Federal Court?

A. Yes.

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Q7. Please describe that exhibit so that it may be clearly identified?

A. This exhibit is a printed volume of some 313 pages and an index of three pages, and has a cover page entitled as follows:

"Transcript of Record  
Supreme Court of the United States  
October Term, 1937  
No. 63"

The United States of America and Interstate Commerce  
Commission, Appellants,

v.

W. V. Griffin and H. W. Purvis, Receivers for Georgia  
& Florida Railroad.

Appeal from the District Court of the United States  
for the Southern District of Georgia.

(Filed May 15, 1937)"

Q8. Was the printing of this volume under the direction and control of the Supreme Court of the United States?

A. I so understand, and it constitutes the record which was before the Supreme Court when the matter was before it as Case No. 63, October Term, 1937, when it handed  
81 down its decision of February 28, 1938.

Page 18:

Q9. Can you give us a chronological statement of the principal items which are included in this printed volume with reference to the page numbers?

A. Yes.

Q10. Please do so.

A. April 1, 1931—Petition of G. & F. R. R. to I.C.C. for re-examination of rates—pages 21-22.

April 9, 1931. Answer of Postmaster General to petition for re-examination—pages 23-24.

May 14, 1931—L.C.C. order for re-examination—pages 24-25.

May 10, 1933—Report and order of L.C.C. (192 L.C.C. 779) pages 5-10.

July 6, 1933—G. & F. R. R. petition to L.C.C. for reconsideration—pages 25-27.

July 24, 1933—Reply of Postmaster General to petition for reconsideration—pages 27-29.

October 3, 1933—Order of L.C.C. denying petition for reconsideration—page 11.

March 3, 1934—Petition to U. S. District Court, Augusta Division, Southern Judicial District of Georgia—pages 1-5.

January 23, 1935—District Court opinion and decree—pages 29-30.

March 12, 1935—Petition of Postmaster General to L.C.C. for

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re-opening of record—pages 31-32.

82 March 12, 1935—Order of L.C.C. reopening record—pages 32-33.

February 4, 1936—Report of L.C.C. on further hearing—pages 41-51.

June 20, 1936—Supplemental bill of G. & F. R. R. in District Court—pages 35-40.

February 23, 1937—District Court opinion and decree—pages 55-58.

April 16, 1937—Stipulated narrative of the evidence before the L.C.C.—pages 59-304.

Q11. Does the stipulated narrative of the evidence before the Interstate Commerce Commission recite the testimony correctly?

A. Yes. It is, of course, a condensation of the verbatim testimony in narrative form, prepared, I understand, by counsel for the Interstate Commerce Commission and as set out in the stipulation on page 59, and agreed to by counsel for the Receivers as a true and correct transcript of all the oral testimony of the witnesses, and 39 exhibits.

Q12. Have you any other exhibits to show what further attempts have been made to secure a determination of fair and just compensation by the Interstate Commerce Commission?

A. Yes. I have here copy of a petition filed with the Commission on February 1, 1944, asking for a re-opening

Page 20:

and rehearing for the presentation of additional evidence, before going further with the hearing before the Court of Claims.



Q13. Anything else?

A. Yes, I have here copy of the answer of the Postmaster General, dated February 11, 1944, in which re-opening, rehearing and reconsideration was opposed, and I call special attention to the representation on page 6 of that answer that the regularly and properly made joint cost study has been accepted by the Post Office Department as sufficient.

Mr. HERR: Mr. Commissioner, may this be marked for identification as Exhibit No. 3?

Q14. Anything else?

A. Yes, I have here a copy of the Commission's order of March 6, 1944, in which it refused to re-open the proceeding for further hearing or consideration.  
*Page 21:*

Mr. HERR: Mr. Commissioner, we offer in evidence the Exhibits Nos. 1, 2, 3, and 4, described by the witness for the purpose of establishing the jurisdiction of the Court of Claims in this suit and to show the record before the Interstate Commerce Commission, and that the prerequisite steps which have been taken without avail before the Interstate Commerce Commission and in the United States District Court for the Augusta Division of the Southern District of Georgia in an effort to obtain fair and reasonable compensation for the taking of the use of the Receivers' property and services.

The COMMISSIONER: Let us dispose of these one at a time. Offer your Exhibit No. 1, and if you have any explanation to make, make it.

Mr. HERR: Mr. Commissioner, we offer in evidence, *St. 82* Exhibit No. 1 for identification.

The COMMISSIONER: Now, state the purpose of it.

Mr. HERR: For the purpose of establishing the jurisdiction of the Court of Claims in this suit, and to show the record before the Interstate Commerce Commission and the steps which have been taken without avail before the Interstate Commerce Commission and in the United States District Court for the Augusta Division of the Southern District of Georgia, in an effort to obtain a fair and  
*Page 22:*

reasonable compensation and for the taking and use of the Receivers' property and services.

Now, let me go a step further: Also, we offer this same Exhibit No. 1, to show both the records and the supporting details of the joint cost study for the year 1931 upon the formula or bases customarily employed in proceedings before the Interstate Commerce Commission for the determination of rates of mail pay, as prescribed by the Post Of

Post-Department, as the witness has already pointed out, as being the regularly and properly made cost study accepted by the Post Office Department as sufficient.

It has been testified to by Mr. Todd, one of the witnesses who is now on the stand and can be cross examined. There were other witnesses who are not now here, because we felt we had a tentative understanding with counsel for the Government that we would put in Exhibit No. 1 by stipulation, and were not advised until Saturday that this would not be done.

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Page 23:

Mr. Hirt: I am now offering to produce later for cross examination any of the other witnesses as well as Mr. Todd, in case counsel for the Government advises us they desire to do so.

Therefore we offer this exhibit, subject to the reservation by the Government of the right to cross examine at any time to be agreed upon, with the understanding that, in case the Government does not elect to further cross examine by that time, this exhibit will be received in evidence for the purpose of showing that cost study for the year 1931.

Page 24:

Mr. Rouse: For the purpose of proving the previous attempt by the plaintiffs to recover, we do not object to that part of Exhibit No. 1 which recites and copies the findings, the orders, opinions, and decrees of the Interstate Commerce Commission and of any court; nor do we object to the petitions and answers of the parties as copies in Exhibit No. 1.

We do object to the long narrative statement of the evidence and statistical tables, etc.

Accordingly, I therefore object to everything in Exhibit No. 1 from Page 59 to Page 304, the print pages; but not to Pages 1 to 48, or the tables after 304 for the purpose of showing the history of the proceedings and attempts made by the plaintiffs to get their money.

The Commissioner: The objection to that portion of the Page 25:

exhibit containing evidence produced before the Interstate Commerce Commission is sustained; the Plaintiffs except, and the reception will be noted.

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Now, let us have you state, Mr. Hirt, the other purpose for which you offer that portion of the transcript containing the evidence produced before the Interstate Commerce Commission.

Mr. HITT: Mr. Commissioner, we offer the balance of the transcript from pages 59 to 304, inclusive, as direct testimony upon the matter of compensation to be determined by the United States Court of Claims; it being substantially the testimony which will be given by the witnesses, if here present and testifying.

That sets forth the joint cost study and the underlying facts in the joint cost study, and the testimony of witnesses both for the Post Office Department and for the carrier.

Now, we make that offer subject to the right of the Government to cross examine the witnesses if they desire to do so; but, in the event that they elect not to cross examine the witnesses, we would ask that the testimony be received in evidence.

Mr. ROOD: For what purpose?

Mr. HITT: As direct testimony upon the compensation due the carrier in this proceeding, based upon the formulas *Page 26:*

and bases customarily employed by the Interstate Commerce Commission, and which were employed in their consideration of the petition of the Plaintiffs for a re-examination of the railway mail pay.

The COMMISSIONER: You offer it as your evidence to prove the value of the services?

Mr. HITT: Correct, yes, sir.

87 The COMMISSIONER: That is, your substantive evidence on the merits?

Mr. HITT: On the merits, on the formulas and bases set out in that exhibit.

Mr. ROOD: This was a cost study made in 1931?

Mr. HITT: Yes, sir.

The COMMISSIONER: Let us get off the record a minute.

(Here followed discussion off the record.)

Mr. ROOD: Mr. Hitt, as I understand it, this proposed evidence now under discussion is offered as proof of so much of the claim as was stated in the original petition, before its amendment?

Mr. HITT: That is correct; that is to say, the claim has been figured out on the basis of these formulas and cost studies in Exhibit No. 1.

Mr. ROOD: The Defendant objects, first, on the ground that the study of 1931 costs is irrelevant in this proceeding, in view of the fact that the petition was not filed until *Page 27:*

1942 and that all claims which accrued previous to February 2, 1936, are therefore barred by the Statute of Limitations.

Insofar as it is offered to prove any part of the claim, which accrued before 1936, the Defendant objects as irrelevant.

Insofar as it is offered to prove that part of the claim, which is not barred by the Statute of Limitations, that is, claim for payment for services rendered during 1936 and thereafter, evidence of this cost study is incompetent, because, clearly, the costs and operating conditions pertaining to 1936, 1937, and 1938 cannot be shown by a cost study made in a four or five weeks' period back in 1931.

We all know how the turbulent gyration affected the national business economy and the railway industry, especially the railway industry in Georgia, between 1931 and 1936.

If the Defendant is overruled on the issue under the Statute of Limitations; and if the 1931 costs are relevant to this proceeding, in the opinion of the Commissioner and the Court, the Defendant is willing to accept the printed pages 59 to 304, inclusive, of Exhibit No. 1, as the testimony of the Plaintiffs offered to show the 1931 costs, subject to the right of the Defendant to have the witnesses produced and made available in this proceeding for cross examination.

Page 28:

The COMMISSIONER: As to the first point in the objection, that the testimony is irrelevant, with reference to any claim prior to 1936, on the ground that such claims are barred by the Statute of Limitations, I am in doubt as to whether the Statute of Limitations commences its run prior to the finality of the order of the Interstate Commerce Commission; and for that reason, the objection on that ground is overruled.

Mr. Robb: An exception.

The COMMISSIONER: With reference to the second ground of the objection, that part of the transcript which contains the narrative of evidence and the exhibits therewith, introduced before the Commission, is admitted upon the assumption that it formulates or demonstrates the appropriate method for the determination of costs for a particular year; for whatever bearing the different items and facts may, because of the possible effect upon continuous operation, have upon the costs for the subsequent years; and upon the condition that, except when admitted for these purposes, the evidence is contexted up with the subsequent proof showing that the facts and items continued to be the same, or what differences there were for subsequent years.

Mr. Robb: Exception.



The Commissioner: The evidence admitted upon the conditions stated above, and particularly with the understanding that the

Page 29:

Defendant shall have the right to have the witnesses produced for the purpose of cross-examination, if it so demands.

Page 30:

Mr. Hitt: We offer, as Plaintiffs' Exhibit No. 2, a copy of the petition to the Interstate Commerce Commission in behalf of the Plaintiffs, February 1, 1944, asking for re-opening and rehearing and reconsideration of further evidence. This, I may say, was pursuant to the understanding with the Court that it would grant a postponement of the hearing for the purpose of doing so.

Mr. Roan: No objections.

The Commissioner: It will be admitted.

Page 30:

Mr. Hitt: We offer in evidence, as Plaintiffs' Exhibit No. 3, a copy of the answer of the Postmaster General to the petition for reopening, rehearing, and reconsideration, dated February 11, 1944.

Mr. Roan: We are now offering this, Mr. Hitt?

Mr. Hitt: I am completing the record. It is comparable to the record that is already included in Plaintiffs' Exhibit No. 1, showing the petitions and answers, etc.

Page 31:

Mr. Roan: I object to this, because it contains a discussion by the Post Office Department of the PCA cost study, which might be construed as admissions by the Defendant.

The Commissioner: Objection overruled.

Mr. Roan: An exception.

Mr. Hitt: We now offer Plaintiffs' Exhibit No. 4, being a copy of the order of the Interstate Commerce Commission of March 6, 1944, denying the Plaintiffs' petition of February 1, 1944, for re-opening, rehearing, and reconsideration.

Mr. Roan: No objections.

The Commissioner: Admitted.

Page 32:

Q15. Do you know whether or not a similar cost study was ever made for the Georgia & Florida before the one in 1934?

A. Yes. In a previous proceeding which involved all, or nearly all, steam railroads in the United States a joint cost study was made in the year 1931 on the same formula or basis for all the railroads involved, including the Georgia & Florida, as described in the opinion and decision of the Interstate Commerce Commission of July 10, 1928, 144 I.C.C. 675.

Q16. Can you tell us in a general way if the result of that cost study was similar to the joint cost study in 1931?

91 Mr. Boone: May I ask what you mean by "joint cost study"?

Mr. Herr: That is the term that is used by the Post Office Department, referring to the joint cost study of 1931, and in other cases, in which the formulae and bases employed were, generally speaking,

The Commissioner: Who was the other part of the "joint"?

Mr. Herr: "Joint" is between the carrier and the Post Office Department, with the sponsorship of the Interstate Commerce Commission.

Mr. Boone: When was the joint cost study made, and by whom?

Mr. Herr: Made by the Post Office Department and the carrier.

Page 31:

The Commissioner: I suspect the witness ought to testify to that.

Mr. Boone: Yes, sir. I should have reserved that for cross examination.

The Witness: Yes, the results were substantially similar, allowing for some differences in the factors in the different periods.

By Mr. Herr:

Q17. Can you tell what action the Commission took in that case?

A. The Commission's decision of July 28, 1928, to which I have already referred, will, I believe, answer that question better than I can.

Q18. I just want you to state in a general way, for the present information of all concerned, what you understand that result was.

A. For Class I railroads, except New England lines, whose rates had been increased 35% over the rates for other lines in Railway Mail Pay, S.A.C.C. 157, on the average the joint cost study indicated a need for an increase of 26.48% (Page 688) and they were given an increase of 15% for the period from the date the carriers filed their applications for re-examination or where applications were

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not filed on and after July 24, 1925, to July 31, 1928.

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rates established for each mile of service by 15-foot apartment car on and after August 1, 1928, 14.5 cents instead of 12.5 cents previously in effect, was an increase of 16.8% and for 3-foot closed pouch space, 4.5 cents, instead of 3.75 cents previously in effect, was an increase of 20.0%.

For short lines under 100 miles in length, the indicated need was 91% (Page 704) and they, with certain exceptions, were given an increase of 80% for the period from dates the carriers filed their applications for re-examination, or where applications were not filed, on and after July 24, 1925, to July 31, 1928.

The scale of rates established for each mile of service by 15-foot apartment car on and after August 1, 1928, 27 cents for separately operated railroads 50 to 100 miles in length, instead of 15 cents previously in effect, and 34 cents for separately operated railroads less than 50 miles in length instead of 18.75 cents previously in effect, were increases of 80% and 83%, respectively, and the scale of rates established for each mile of service by 3-foot closed pouch space on and after August 1, 1928, 8 cents and 10 cents for similar classes of railroads, instead of 4.5 cents and 5.625 cent rates previously in effect, were an increase of 77.78%.

For the Georgia & Florida the indicated need was 78%, but because it was over 100 miles in length it was only given

Page 75:

the same increase as was given to Class 1 roads generally, and that is why we subsequently sought a further re-examination in 1931, with the expectation that the rates would be fixed on the basis of our own facts, instead of lumping us in with Class 1 roads generally.

Mr. HITT: On Page 8 of the Commission's report, it says, "A return upon this computed at 3.75% gives \$26,282.00 which, added to the indicated deficiency in net railway operating income from mail of \$4,945.00, brings the total claim of the carrier for increased compensation to \$31,227.00. To meet it upon the basis of 1931 operations would require an increase in compensation of 8.40%."

The COMMISSIONER: What is this you are reading from?

Mr. HITT: I am reading from the Commission's decision.

The COMMISSIONER: I see. That is all right. You speak about a joint study. Is that joint study in evidence?

Mr. HITT: Yes, sir.

The COMMISSIONER: Why do you not turn to the joint study?

Mr. Hitt: The joint study sets forth a good many different exhibits, and that is a summary of it.

The Commissioner: Is there not a finding in the joint study that reaches that conclusion?

Mr. Hitt: I do not know that we can find that figure.

In the joint study. As I recollect, what happened was that

The Commissioner: As you read this, while they use the word "claim", it appears to be talking about the facts, because they say:

The total investment in roads, excluding unrelated items, was \$15,864,462.00. Of this, 21.44%, or 94 \$3,400,578.00, was apportioned by the Department to passenger-train service. The part of the latter amount apportioned to mail upon the adjusted space ratio was \$438,803.00. The total investment in equipment, less depreciation, allocated to the passenger-train service was \$135,257.00, approximately 10% of the total. Of this amount, \$18,279.00 was allocated and apportioned to the mail service. The total payment in ~~road~~ and equipment allocated and apportioned to mail was \$457,082. A return upon this computed at 5.75% is \$26,282.00, which added to the indicated deficiency in net railway operating income from mail of \$4,945.00, brings the total claim of the carrier for increased compensation to \$31,227.00.

Mr. Roof: I have no objection to what the Interstate Commerce Commission's opinion says. I do not think the Interstate Commerce Commission found that the statement made by Mr. Hitt, which he read from his printed statement—that the I.C.C. found the mail failed to pay a fair share of the operating expenses.

Mr. Hitt: In any event, Mr. Commissioner, the figure

we are talking about at this time is that figure on Page 8.

The Commissioner: The trouble is with the form of your question. Ask him to assume certain things, and to fix his ratio.

By Mr. Hitt:

Q19. All right, Mr. Todd, assuming that the sum of \$31,227.00 was necessary as an increase to pay the mail's share of the operating expenses and 5.75% return upon the proportion of the investment used for the mail service, can you translate that amount into the rates which would be needed to produce enough revenue from the mails in the year 1931, to pay just and reasonable compensation; and what should those rates have been, as compared with the rates which have been paid?



9. The rate which has been paid on 15-foot railway post-office car units was only 14 cents per mile whereas it should have been 27.17 cents per mile.

The rate which has been paid on the so-called three-foot closed pouch units was only 4.5 cents per mile, whereas it should have been 8.33 cents per mile.

Q20. What is the practice with respect to the application to subsequent years of the rates once established upon the basis of these joint cost studies in a particular first period year?

A. The general practice is for the rates, once established, to continue in effect in subsequent years until a petition is filed by a carrier or carriers or by the Post Office Department.

Mr. Roob: This is irrelevant, because this case is being brought contrary to the general practice.

The general practice in a rate proceeding is to fix the rate on the basis of a department study and then set that rate, as the Commission said, really prospectively.

The determination of this proceeding on the principles of a common carrier rate fixing, I take it, would give the Plaintiff no recovery; and it has suggested that the Plaintiffs are bringing this suit not as a common carrier rate proceeding, but to seek recovery for the condemnation of property.

In other words, if this was a suit by the carrier for additional compensation above that already paid for the shipment by the Government of a carload of ammunition at the established rates, that, according to the Plaintiffs, would be a different sort of case from the proceeding as it is actually being prosecuted by the Plaintiffs.

Is that not right, Mr. Hitt?

Mr. Hitt: I do not know that I quite follow your thought there.

The point with us is that we want to give the Commission more than one way of arriving at the value of the property taken.

Page 39:

Now, the joint cost study in 1931 gives us the starting point; that of the rate to be applied. Now, with the succeeding years, the volume of mail traffic varied, and by carrying the rate forward, as is customarily done, we can arrive at a figure showing the value of the services, if we apply the rates which would have been established under the 1931 cost study, to meet the increase that was indicated of \$31,227.00.

The Commissioner: I think there may be some merit to the Defendant's contention, but this may be, and probably is, directed towards the earlier suggestion, namely, that it will have an influence on connecting up the study of 1931 with the later years; and for that reason, I will overrule the objection.

The Witness: I continue my answer. The only indication that the old rates are no longer acceptable, for a re-examination and revision of rates.

By Mr. Herr:

Q21. As a result of the study made by other carriers, especially in the Southeastern territory, with respect to the rates which were established by the Interstate Commerce Commission at its order of July 28, 1928, 144 I.C.C. 625?

A. As a general rule, the rates established by the Commission's order of July 28, 1928, have been applied to each subsequent year.

Page 10:

in the Southeast, and by the carriers generally, with few exceptions.

Q22. Do you know of any exceptions?

A. The only exception I know of in the Southeast is in our own case where we recorded our dissatisfaction with postdating on April 1, 1931, for a re-examination, though, even in our case, in the meantime, the Post Office has continued to make payments to us at those old rates, which we have accepted merely as payments on account.

Q23. Had the rates of 25.11 cents per mile for post office apartment car service and 8.33 cents for three foot closed police service been in effect on and after April 1, 1931, can you tell us what should have been paid to the Receivers of the Georgia & Florida for mail service?

A. I have here an exhibit which shows the miles of service performed, the amounts paid by the Post Office Department at the old rates, and the amounts which should have been paid at the rates which the joint cost study showed to be needed, and the difference between the two, which has not been paid.

Q24. Does the difference in the last column represent the amount which would be necessary to provide the additional compensation from April 1, 1931, to February 28, 1938, needed to pay just and reasonable compensation to the Receivers if measured on the basis of the joint cost study in 1931?

Page 11:

A. Yes. That is correct.

Mr. Herr: We offer his exhibit as Plaintiff's Exhibit No. 5.

By Mr. Room:

Q26. Who made this up?

A. It was made by Mr. Thompson, under my supervision and direction, from the records in these exhibits.

Q27. Who is Mr. Thompson?

A. Mr. Thompson is here present.

Q28. When the table says "rates that should have been" and "what does that mean?"

A. These rates are the ones to which I have testified, or the old rates increased by 8.4%, as the increase indicated that we needed in this 1931 cost study.

Mr. Room: No objection.

The COMMISSIONER: It will be marked as Plaintiff's Exhibit No. 5, and admitted.

By Mr. Hurt:

Q28. Mr. Todd, have you any other study to demonstrate the amount necessary to pay just and reasonable compensation to the Receivers of the Georgia & Florida Railroad for the period April 1, 1931, to February 28, 1938?

Page 121:

A. Yes. You understand that while the Receivers would have been willing to accept compensation at rates indicated to be needed by the joint cost study in 1931, about which I have just testified, we do not feel that we are now limited to that basis, and I want to point out why.

Q29. Please do so.

A. An exact allocation of expenses to several different railroad services is a matter of considerable intricacy and difficulty, and the basis for joint cost studies as worked out between the Post Office Department and Committees of carriers under the sponsorship of the Interstate Commerce Commission, represents a compromise by the railroads upon a method by which they would be willing to be governed in arriving at an approximate determination of the cost of handling the loads which would not be disputed by the Post Office Department.

In my opinion, the Post Office Department would certainly not agree upon any formula or basis of ascertainment, the effect of which would be to pay the carriers more than just and reasonable compensation; hence, in my opinion, the formula and bases customarily employed in the joint cost studies represents something less than the maximum to which the carriers might be entitled.

Q30. Is that true in respect to the determination of compensation for the Receivers of the Georgia & Florida?

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A. Yes; and taking the formula as a whole, I am of the opinion that the Receivers of the Georgia & Florida

are entitled to substantially more than the amount indicated by the 1931 joint cost study to be needed.

Q31. Please proceed.

A. Since the Commission failed to give any effect to the results of the 1931 joint cost study, but instead arbitrarily held us to the rates previously prescribed for large Class 4 systems, like the Pennsylvania Railroad, we feel relieved from any obligation to continue our claim of the amount indicated by the 1931 joint cost study; and have made a further study on another basis, which we submit is a better measure of the amount to which we are entitled as just compensation.

Q32. Are you now prepared to present the new base upon which you rely for the determination of the full amount of just and reasonable compensation which the Receivers claim?

A. Yes.

Q33. Please proceed to do so.

A. The two major objects of my new study are the same as the similar objects of the so-called joint cost study, namely, first, to determine what part of extramailway operating expenses is properly apportioned to mail services; and, second, to determine what part of the value of our property devoted to transportation is properly apportioned to the mail service.

Page 61:

Taking up first the operating expense apportioned to mail service:

The first step is to separate the operating expenses between freight and passenger operation, and for this separation I have used the same separations as were reported to the Interstate Commerce Commission in our annual reports for the years 1931, 1932, 1933, 1934, and 1935, in accordance with their rules for so doing. For 1936, 1937, and 1938, I have used the operating ratio in 1935 developed from the separation of freight and passenger expenses in 1935. I will defer for the moment the explanation of this difference.

The best basis in my opinion for the apportionment of railway operating expenses to every class of passenger train service performed by the Georgia & Florida is that of linear car foot miles, so I now present my exhibit showing how the linear car foot miles for each class of service have been developed.

Mr. Hurn: We now offer this exhibit, consisting of some 45 pages, it being an exhibit showing the development of the linear car foot mile, etc., for the period April, 1931, through February, 1938, as Plaintiffs' Exhibit No. 6.

By Mr. Roe: Off the record, please.

(Here followed a discussion off the record.)

Page 15:

By Mr. Roop:

Q34. Who made up this Exhibit No. 6?

A. It was made by Mr. J. W. Roberts and Mr. Ott Thompson, under my supervision and direction.

Q35. You, personally, vouch for the accuracy of the calculations contained

A. Yes, sir.

Q36. And the items set forth?

A. Yes, sir.

Mr. Roop: No objection, subject to the reservation to the Defendant of the right to cross examine with regard to this exhibit, and others which I see forthcoming, and also Exhibit No. 5, on the same items, which the Commissioner has granted us in respect to the cost study data contained in Exhibit No. 1.

The Commissioner: That is so understood, and Exhibit No. 6 is admitted.

102 *Procedure and Statements of Commissioner and  
of Counsel on this Record of the Hearing  
on February 11, 1946*

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ANDREW G. THREADGILL, a witness produced on behalf of the defendant, having been first duly sworn by said Commissioner, was examined, and in answer to interrogatories, testified as follows:

Direct Examination by Mr. Roop:

Q1. Mr. Threadgill, state your name and your address to the Reporter.

A. Andrew G. Threadgill, Assistant Superintendent at Large, Railway Mail Service, assigned to the Bureau of the Second Assistant Postmaster General.

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Q11. You are generally familiar with the physical location of the Georgia & Florida Railroad, are you?

A. I am; yes, sir.

Q12. You have been acquainted with the service that railroad has been performing for the Post Office Department, have you?

A. In general.

Q13. Yes.

A. Not in detail.

Mr. Roop: I now offer for the records an exhibit.

The Commissioner: Defendant's Exhibit 1.



The Witness: This is the line of the Georgia & Florida Railway (indicating).

The Commissioner: Before he begins to discuss that. Any objection?

Mr. Herr: No objection.

The Commissioner: It will be admitted.

(Post route map of Georgia was marked "Defendant's Exhibit No. 1," and made a part of the record.)

(Page 128)

By Mr. Roon:

Q14. Will you describe this sheet, this map which I show you?

105 A. This is a post route map of the State of Georgia which shows the railroads which carry the mail, and the routes over which star route service is authorized, and in some cases rural delivery routes.

Q15. Will you explain what you mean by the term "star route" for the record?

A. A star route is mail service to be performed under contract which is let to the lowest responsible bidder, and the primary purpose of it is to carry mail from one post office to another.

Q16. And will you describe what you mean by rural delivery or R.F.D. routes?

A. Rural delivery is service performed by an employee of the Post Office Department, and its principal purpose is to deliver mail to patrons.

Q17. Does your map show the route of the mail service on the Georgia & Florida Railroad?

A. It does.

Q18. And how have you identified that?

A. It is marked in blue.

Q19. The blue line, then, shows the route of the railway post office from Augusta to Valdosta?

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Threadgill—Direct.

A. That is right.

Q20. And the continuance of the route to Madison, Florida?

A. It does.

(Page 130)

Q24. Well, now, let's start at Augusta. Do you have other mail routes by railroad coming into Augusta?

A. We do.

Q25. Will you tell what they are?

A. The Augusta & Atlanta R.P.O., which is the Georgia railroad; the Charlotte & Augusta R.P.O., Southern Railway; Branchville & Augusta R.P.O.

Q26. Branchville is in what state?

A. South Carolina.

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Q27. And what railroad is that one?

A. Southern Railway.

Q28. Yes.

A. The Wilmington, North Carolina & Augusta R.P.O., which is the Atlantic Coast Line; the Augusta & Point Royal R.P.O., which is the Charleston & Western Carolina; the Augusta & Savannah R.P.O., which is the Central of Georgia Railway; the Augusta-Madison R.P.O., which is the Georgia & Florida.

By Mr. Roop:

Q29. Do you also have star routes into Augusta?

A. We do.

Q30. Can you tell what they are?

A. I wouldn't be able to name all of them without referring to records.

Q31. Name the principal ones that come to your mind.

(Page 132)

A. We have one, Sandersville to Augusta.

Q32. Now, Sandersville is in what state?

A. Georgia. Sandersville, Georgia, to Augusta.

Q33. And is that marked on this map?

A. That is marked in red.

Mr. Roop: For the record, I will mark that with an "A" and I will put the "A" just over the word "Gibson", to identify that route.

By Mr. Roop:

Q34. Can you name some more star routes out of Augusta?

108 A. We have one, Augusta to Millen, Georgia. We have one between Augusta and Midville, Georgia.

The Commissioner: While you are marking the map, you had better get it into the record each time that you do it.

Mr. Roop: Yes. I have just marked the route to Millen with a "B" and the route to Midville with a "C".

The Witness: There are other star routes into Augusta, but I am not able to name all of them without referring to records.

By Mr. Roop:

Q35. And the ones that you have named are typical, I suppose?

A. They are.

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Q96. Now will you state the post offices after Midville—just name them—which have alternative service?

121 A. Swainsboro, Wesley, Vidalia.

Q97. What does Vidalia have?

A. It is supplied by the Savannah & Montgomery, Alabama, Railway Post Office, the Seaboard Air Line Railway and by the Macon & Vidalia Railway Post Office, Macon, Dublin & Savannah Railroad.

Mr. HERR: May I ask as to what point this testimony is addressed, what it is you are trying to establish, that you are trying to show?

(Page 153)

Mr. ROOD: It will show alternative service available in all these points at the same rates or at cheaper rates and that in fact railroads voluntarily cut their rates below the I. C. C. rates in order to get this business, as it is so profitable to them.

The COMMISSIONER: Do you mean that a railroad running from Savannah to Atlanta is an alternative service for one running from—

Mr. ROOD: Oh, certainly.

The COMMISSIONER: —Augusta down to—

Mr. ROOD: Yes, indeed; the mail service is.

The COMMISSIONER: You mean they take the mail all the way down by Savannah just to get a little cheaper rate?

Mr. ROOD: Oh, the mail service is a complete network as is shown here.

The COMMISSIONER: That is not answering my question.

I am asking whether a particular service within—  
122 that goes back—rather, whether a roundabout service is an alternative—as, for example, down around Savannah and back up to Augusta—is an alternative service for direct routes where there is no emergency. Of course, it could be shipped via Key West if it had to be done.

Mr. ROOD: Well, all-right.

By Mr. ROOD:

(Page 154)

Q98. Mr. Thwagill, suppose there were no Georgia & Florida Railroad mail from Montgomery, Georgia to Augusta. In that case would it be possible to move mail from Montgomery to Augusta?

A. Do you refer to Vidalia, Georgia, instead of Montgomery?

Q99. No. I am just talking about Montgomery. Isn't that the—

(Page 133)

Threadgill—Direct.

Q36. Typical in their physical nature, at least. Is the service furnished by truck?

A. I do not have a record of the equipment used. I would assume that it is furnished by truck.

Q37. It is furnished over public highways?

A. It is.

Q38. Is it furnished by independent contractors instead of by the Post Office Department itself?

A. It is.

(Page 134)

Threadgill—Direct

By Mr. Roof:

Q41. That is, is mail loaded on at Augusta, or does the train start out empty of mail?

A. Mail is loaded into the car at Augusta, taken in by the Railway Postal Clerk.

Q42. How, in what form, is the mail? What sort of packages? Is it pouches?

A. It is in pouches and sacks. In some cases parcel post is outside of sacks.

Q43. And where does that mail come from?

A. That mail comes from Augusta, Georgia, Post Office and from various lines centering at Augusta.

Q 44. And where is the next post office stop?

A. The first post office out of Augusta going south

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Gracewood, Georgia. At that point the clerk would deliver the mail for Gracewood in a pouch or sack, or possibly all in one pouch.

Q45. Is there any other way by which mail can be moved from Augusta to Gracewood?

119 A. There is.

Q46. What is it?

A. By star route.

Mr. Roof: I will underline "Augusta" on my map in blue; I will underline "Gracewood" in blue. That is in Exhibit A.

By Mr. Roof:

Q49. What is the next post office stop after Gracewood?

A. Hephzibah, Georgia.

Q47. What happens there?

A. The clerk delivers the mail for Hepzibah in pouches or sacks.

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Q60. Is there any other way of moving mail between Augusta and Keyville except the Georgia & Florida Railroad?

A. There is.

Q61. How?

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A. By star route.

111. By Mr. Roop:

Q62. Is star route as efficient from Augusta to Keyville as the Georgia & Florida Railroad is, as far as the post office is concerned? Is the star route as satisfactory?

A. That is not a fair question?

Q63. Off the record: meaning what?

The COMMISSIONER: Well, you better get that on the record, in view of his answer.

The WITNESS: He asked if the mail could be—is this off the record?

The COMMISSIONER: No. On the record because your answer, "This is not a fair question", is on the record, and that ought to be explained, I think.

The WITNESS: A star route is as efficient in moving the mail as the railroad. The advantage in having service by railroad in this case is that mail may be taken into the car in bulk at Augusta and distributed by the clerk before reaching an intermediate office.

The COMMISSIONER: By "distributed" you mean assorted?

The WITNESS: Assorted, if that word is more clearly understood.

The COMMISSIONER: I think a layman may be confused. A layman doesn't understand the post office terminology.

Mr. HITT: When you say that it is not a fair question,

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112. you mean that you were comparing unlikes? That is to say, you are talking, in the instance of the star route, of just hauling just so much weight of mail; where as in the case of the railroad you are talking about hauling a traveling post office?

The WITNESS: That is right.

Mr. HITT: Yes.



By Mr. Roon:

Q64. I am limiting my questions just to the post offices that we have mentioned so far: Gracewood, Hephzibah, and Keysville, and I ask you if the post office use the star route to those points from Augusta as freely as it would the railroad.

A. It does.

Q65. Why do they have a

The COMMISSIONER: That answer is clear, it is a direct answer, but I don't know what you mean by if they use it as freely. That doesn't convey any significance to me.

Mr. Roon: All right.

The WITNESS: I answered that with the question as I understood it.

The COMMISSIONER: Yes.

By Mr. Roon:

Q66. By "freely" I mean do they use the star route and the railroad interchangeably?

Threadgill—Direct

A. They do. At certain times during the day they dispatch mail over this star route. At other times they dispatch mail by the railroad.

Q67. Why do they have a star route if they have a railroad?

A. Because the railroad doesn't provide the operation of trains at times which would give satisfactory service to the post offices and patrons involved.

114 The COMMISSIONER: You mean there are not enough trains per day?

The WITNESS: I attempted to say that trains are not operated at the time which would give satisfactory service to the post offices and patrons.

By Mr. Roon:

Q68. Now, who decides, when the trains go—the post office or the railroad?

A. You mean when the train leaves Augusta?

Q69. Yes. Who fixes the timetable?

A. The railroad company.

Q70. Oh, I thought the post office did. Is that wrong?

A. Oh, no; the post office department has no control over railroad schedules.

Q72. What is this point I am pointing to on the map?

A. Blythe, Georgia.

Q73. Is that a post office?

A. It is.

Q74. Between Hephzibah and Keysville?

A. That's right.

Q75. And does this train serve Blythe?

A. It does.

115 Q76. And is there alternative service to Blythe?

A. There is.

Q77. All right. Now, what is the next post office that the train serves after Keysville?

A. Gough, Georgia.

Q78. And how big a place is that?

A. I am unable to answer that question.

Q79. All right. What is the next one after Gough?

A. Vidette.

Q80. And then?

A. Rosier.

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Q81. Now, do Gough and Vidette have mail service in addition to the railroad train?

A. They do not.

Q82. They do not?

A. So far as I know.

Q83. They do not so far as you know. And does Rosier?

A. It does. It is supplied by R. F. D. from Midville.

Q84. And is Midville the next post office stop on the train after Rosier?

A. It is.

116 Q85. And does Midville have alternative service?

A. It does.

Q86. By what?

A. By the Atlanta & Savannah R. P. O. and the Central of Georgia Railway.

Q87. Is there a star route there, too?

A. There is.

Mr. ROOD: That is the route that we marked "Route C" from Augusta to Midville.

By Mr. ROOD:

Q88. What is the next post office after Midville?

Mr. HITT: Mr. ROOD, may I ask if you are going to take every station along the line?

Mr. ROOD: Right.

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Mr. HITT: Well, I object to this.

The COMMISSIONER: What are you going to prove by taking every station?

Mr. Herr: That is what I want to know.

Mr. Roop: Value of services, comparable services alternatively available, market in the region.

117 Mr. Herr: Do you wish to say that you will prove what it is you are trying to show?

Mr. Roop: My witnesses will show it.

The Commissioner: Now wait a minute. You are trying to show alternative services available?

Mr. Roop: Surely, at lower prices.

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Mr. Herr: Well, it is still objectionable. I object, Mr. Examiner, that this is immaterial and irrelevant. He is trying to compare two entirely different propositions. One is the handling of a railway post office in which there is a postal clerk, where he assort the mail; and the other

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is a question of hauling so much weight in sacks, or something of that sort, from one point to another.

Mr. Roop: Well, the comparativeness is argumentative. He will compare them.

The Commissioner: Let me ask you this: What is the nature of—is it true that these star routes you are talking about are not traveling post offices, but simply carry sacks of mail from one place to another?

Mr. Roop: Yes, carry sacks of mail from one place to another; and the mail, instead of being sorted in transit, is sorted at each post office.

The Commissioner: And the facilities in the star route are the body of a truck?

118 Mr. Roop: The body of a truck, plus drawing up to the post office and stopping and letting the postmaster take the pouches marked for him, which have been very carefully contrived and arranged so as to give a minimum sorting.

The Commissioner: Objection sustained.

Mr. Roop: Objection to what?

The Commissioner: Objection to this questioning as to every town, whether there is a star route and whether or not it is available.

Mr. Roop: My witness's last statement was that there was an alternative railroad route at Midville.

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The Commissioner: I did not understand that.

Mr. Roop: Atlanta-Savannah Post Office R. P. O.

Mr. Hitt: I object to this line of questioning as being irrelevant and immaterial.

The Commissioner: All right. Now let us take the question as to the Atlanta Railroad, and let's see what that is, see whether they give the same kind of service, whether it is—

By Mr. Rood:

Q89. Tell us about the Atlanta-Savannah post office and the service it performs at Midville. What railroad is it run on?

A. The Central of Georgia Railway.

The Commissioner: From?

By Mr. Rood:

Q90. From where to where?

A. Atlanta to Savannah.

Mr. Rood: Does the court take judicial notice that Atlanta and Savannah are the two biggest towns in the State of Georgia?

The Commissioner: I presume it will, if it is material.

Mr. Rood: It is material in that it has to do with the current and flow of mail traffic.

The Commissioner: Very well. Let the witness

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proceed and point out wherein the services are comparable; and we will see whether they are comparable.

120 The Witness: Midville receives its mail—part of its mail from trains operated on the Atlanta and Savannah R. P. O. That is the railway post office.

By Mr. Rood:

Q91. Is that 15-foot space?

A. No.

Q92. What is it?

A. They have 30-foot apartment cars in the trains operated between Atlanta and Savannah; that is, 30 linear feet.

Q93. And how many trains stop at Midville?

A. Four.

Q94. Four.

A. On the Atlanta & Savannah line.

Q95. Incidentally, what is the test you make which leads you to operate 15-foot R. P. O. space or 30-foot R. P. O. space? That is, why do they run 30-foot post offices on the Atlanta-Savannah line and only 15-foot post offices on the Augusta-Madison line?

A. Because the volume of mail handled is greater.

Mr. Rood: This is Montgomery County. Vidalia is what you are speaking of.

The COMMISSIONER: The point I am getting at is this:

Mr. Rood: Oh, I beg your pardon. I do refer to Vidalia, yes.

The COMMISSIONER: The point I am getting at is this: You are trying to make a comparison of the value of a service around by way of Savannah with the direct service through to Augusta by the railroad here in question, on the theory, I presume, that in a suit for the value of land you possibly might be permitted to show the value of comparable land, and it is your position—

Mr. Rood: Adjacent.

The COMMISSIONER: And it is your position, around by way of Augusta is comparable—or around by way of Savannah is comparable to the direct route to Augusta; is that it?

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Mr. Rood: Strictly—

The COMMISSIONER: Is that it?

Mr. Rood: Yes, sir.

The COMMISSIONER: Yes. Well, I will sustain an objection on the ground that they are not comparable.

123 Mr. Hitt: I object on the ground they are not comparable. Star routes are not comparable, and the alternatives by rail are not comparable.

The COMMISSIONER: It is very doubtful. Many jurisdictions reject proof of value of comparable properties in any event, but here I sustain the objection that they are not comparable.

Mr. Rood: Yes. I except.

By Mr. Rood:

Q100. Mr. Threadgill, suppose you had a parcel post package going from Vidalia, which is in Montgomery County—I had those two names mixed before, on the map here—from Vidalia to Washington, D. C., could that move on the railway mail train to Augusta?

A. It could.

Q101. Could it move on the railway mail train to Savannah?

A. It could.

Q102. Either way?

A. It could.

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Q103. As a matter of fact, which is the most frequent service?

A. Well, the Savannah-Montgomery R. P. O. has only one train in each direction at present. They have had more



frequent service, but at present they have only one train in each direction.

Q104. Well, the timetable here shows a trip out of Vidalia at 5:20 p.m. Is that what you refer to?

A. That is one of the trains on the Savannah and Montgomery R. P. O.

Q105. And then I see a trip from Vidalia to Savannah at 7:20 a.m. What is that?

124 A. That is star route service.

Mr. HERR: Mr. Commissioner, I object to this. A. Sustained.

Mr. ROOD: Well, your Honor, if we can't prove market value by the value of adjacent comparable properties, we are in a bad spot here.

The COMMISSIONER: I told you it was my view of it that they are not comparable services. At the time those trains were running the others were not comparable because they were much further around, going to different places. You have to go into the whole setup and organization of the other railroads to show if there is a comparable situation.

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Mr. ROOD: Well, I say, now, on a parcel post shipment from Vidalia to Washington, D. C. My witness says they can go equally either way.

The COMMISSIONER: He just didn't say they go equally. He said he didn't ship them from one place over the route that could be shipped the other way. He didn't say there was an equal choice at the time the trains were running.

By Mr. ROOD:

Q106. Well, Mr. Threadgill, which is a preferable route from Vidalia to Washington, D. C., for a parcel post shipment?

A. It would depend on the time the parcel is placed in the post office.

Q107. Do you mean to say it would go on the next train, generally speaking, as a rule?

125 A. Not always.

Mr. HERR: I object to that. I don't see where that leads us anywhere.

Mr. ROOD: Well, if the only difference is the trains go at different times, that is comparable.

Mr. HERR: It is true that if a town isn't served by one line of railroad, why, the government can send it by another line of railroad or by a star route to get it there somehow. There are no insuperable difficulties to keep them.

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from getting mail to a town by star route; but when it comes to these services by traveling post offices, why, they have a post office where they can assort the mail en route and distribute it as they like, going down another line of road to various and sundry towns.

Mr. Rood: My witness didn't say that the Vidalia Savannah route is a traveling post office.

Mr. Hitt: Yes.

The COMMISSIONER: But the other post office cannot possibly serve the towns which this one is serving. Yes, it can serve Washington, D. C., and it can carry distance between certain terminal points, but it cannot possibly serve the towns in between, and that is the reason they have got it.

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Q109. Mr. Threadgill, now if there were no Georgia & Florida Railroad, what would the post office do to move mail from Vidalia to Washington?

Mr. Hitt: I object as being irrelevant and immaterial.

The COMMISSIONER: Objection sustained.

By Mr. Rood:

Q110. What would it do to move mail to Augusta?

Mr. Hitt: I also object to that.

The COMMISSIONER: Objection sustained.

Mr. Rood: To Augusta?

The COMMISSIONER: Yes.

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Mr. Rood: And, I except to the Commissioner's rulings, respectfully. As it understood that exception is reserved?

The COMMISSIONER: You have a right under the rules to except; you don't have to get any permission. However, if you want to gain anything by it you better make an offer of proof.

Mr. Rood: Do I have to note the exceptions each time?

The COMMISSIONER: Yes, each time you should note it.

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Mr. Rood: Yes. All right.

I now offer to prove that, if the Georgia & Florida Railroad ran no mail trains at any time from 1931 to the present the buyer of the mail service on that railroad (that is to say the Post Office Department) would be able to employ adequate alternatives at a financial saving, to move mail out of Vidalia to any point in America served by any other railway route or star route or R. F. & D. route.

Mr. Herr: I object to that, being irrelevant and immaterial.

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Q111. The next post office after Vidalia is what?

A. Alston.

Q112. Alston. And the next one after that?

A. Uvalde.

Q113. Do they have alternative service?

A. They do.

Q114. In the form of star routes?

A. They do.

Q115. The next one is what?

A. Hazlehurst.

The COMMISSIONER: These star routes are the trucks you are talking about?

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Mr. Rood: Yes, just defining physique.

The COMMISSIONER: All right.

128 Mr. Rood: We will take up the value of it a little later.

The COMMISSIONER: Well, I want to be sure what they are, so it shows.

Mr. Rood: Yes. Star routes.

By Mr. Rood:

Q116. The next station is Hazlehurst, you said?

A. That is right.

Q117. Now, Hazlehurst has another railway route, I believe, that is shown on the map. What route is that?

A. That is the Atlanta & Jacksonville R. P. O.

Q118. With how many trips daily?

A. Two trips each way per day.

Mr. Herr: Now let me—I thought the objection went to all of that had been ruled out. I thought this testimony of ten minutes more was something else. I didn't know it was going back and putting in the same thing after getting it ruled out.

The COMMISSIONER: Well, if it is the same thing I certainly—

Mr. Rood: I have about eight more stations.

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The COMMISSIONER: Oh, well, but is it the same thing exactly?

Mr. Rood: The general physical description of this route, what it connects with and—

The COMMISSIONER: If it is for the purpose of showing that there are star routes and that the mail might have been shipped over the star routes instead of by this service, that subject has been ruled upon, and that is what I want you to make a general offer of proof upon.

By Mr. Roob:

Q119: Well now, what does the clerk do at Hazlehurst on this train, Mr. Threadgill?

A. On the Georgia & Florida train?

Q120: Yes.

The COMMISSIONER: Well, he testified to that in the beginning of his examination; he said that he opened up some of the mail bags; he distributed the mail.

By Mr. Roob:

Q121: What does he do when he gets to Hazlehurst?

The COMMISSIONER: To Hazlehurst?

Mr. Roob: Hazlehurst, yes. Hazlehurst is an important connecting point with divergent routes.

The COMMISSIONER: He did not testify specifically to that, although he did testify that the clerk sets bags out at the door

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of the car, where they are picked up by somebody else outside.

Mr. Roob: Yes, all right.

130 Q122: Where do the bags go at Hazlehurst that he sets out at Hazlehurst?

A. He puts off bags for the Hazlehurst post office and for connection with Atlanta and Jacksonville trains.

Q123: Those are other trains that run through there that have a railway post office that does connect?

A. They do.

Mr. Roob: Objection?

Mr. HITT: My main objection is just the time he is taking.

Mr. Roob: Well, I said ten minutes.

Mr. HITT: Well, it is as quick, I guess, to let you go ahead and put that junk in, and to keep on fussing over it.

Mr. Roob: If this route is unique, why, we have got to have the most careful description of what it does, if possible, if we are going to put it in a glass house or a tower of ivory.

By Mr. Roob:

Q124: After Hazlehurst the next post office is?

A. Denton, Georgia.

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Q125. I see from the map that Denton has an R. F. D. service from Hazlehurst: is that correct?

A. That's right.

Q126. And why is that?

A. Because the trains operated over the Georgia & Florida do not provide satisfactory service to the post office and patrons.

Mr. HITT: When you say "satisfactory service," you mean service that may be different hours of the day or often or frequent, and that is the sort of thing you are talking about?

The WITNESS: I mean by "satisfactory service" that they don't provide service at the time people want their mail. Is that clear?

Mr. HITT: Partially. That isn't the only thing that enters into satisfactory service, though. Isn't frequency an element?

The WITNESS: It might be. Frequency is an element.

Mr. HITT: Yes. In other words, you have only service one way each day by railroad; and if the people want oftener service than that or different hours, why, naturally they can get it by establishing a star route.

The WITNESS: That is correct.

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Q127. The next post office is?

A. West Green.

Q128. After that?

A. Douglas.

Q129. What happens when the train gets to Douglas?

A. At Douglas mail is dispatched for the Douglas post office and received from the Douglas post office; also may be dispatched for connection with the Atlanta & Waycross R. P. O.

Q130. The Atlanta & Waycross R. P. O. being a—

A. It is on the line of the A. B. & C. Railroad: Atlanta, Birmingham & Coast.

Q131. Yes. And it runs between what points?

A. Between Atlanta and Waycross, Georgia, and one

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set of trains between Atlanta and Brunswick, Georgia.

Q132. Yes. Between Douglas and West Green the map shows a star route—shows an R. F. D. also; is that correct?



133 A. That's right.

Q133. Now, after Douglas, the next post office stop on our train is what?

A. Willacoochee.

Q134. What happens there?

A. At that point mail is delivered to and received from Willacoochee post office and may be received from or dispatched to trains of the Waycross & Albany R. P. O., which is on the Atlantic Coast Line Railroad.

Q135. Is this Waycross & Albany route part of a joint route between Atlanta and Jacksonville?

A. Through trains operate from Atlanta to Jacksonville over the Central of Georgia and the Atlantic Coast Line on this track.

Q136. Isn't that also true of the route that connects at Hazlehurst?

A. Yes, through trains operate between Atlanta and Jacksonville over that line.

Q137. And is it also true of the route that connects at Douglas?

A. I can't answer that question.

Q138. All right.

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A. No through mail trains operate there.

Q139. All right. The next stop after Willacoochee is what?

A. Nashville, Georgia.

Q140. Yes. After Nashville?

A. Ray City.

Q141. Now, Nashville shows a star route running over to Adel; isn't that correct?

A. That is right.

Q142. Which is on what railroad?

A. Atlanta, Valdosta and Jacksonville R. P. O., which is the Southern & Florida Railroad at that point.

Q143. From Nashville down, the Georgia & Florida seems to parallel the Georgia, Southern, & Florida into Valdosta. Is that roughly correct?

A. Roughly. They do not touch at Nashville.

Q144. No. The next stop after Nashville you said was Ray City, I believe.

A. Ray City.

Q145. And then?

135 A. Then Barretts.

Q146. And do both of those have star routes?

A. Both of those are served by star route from Adel.

Q147. And the next stop after Barretts is Valdosta?

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A. Valdosta.

Q148. Which has what kind of service connect?

A. Which has service by the Atlanta, Valdosta & Jacksonville R. P. O., Georgia, Southern & Florida Railway; the Waveross & Montgomery, Alabama, R. P. O., which is the Atlantic Coast Line; the Valdosta and Palatka, Florida, R. P. O., which is the Georgia, Southern & Florida.

Mr. ROOD: At Valdosta I believe the R. P. O. service stops; is that not true, Mr. Hitt?

Mr. HITT: That is correct. It is called the Augusta and Madison.

Q149. Is there any similar run over the railroad from Valdosta to Madison?

A. We have mail service authorized but not by

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railway postal clerks.

Mr. ROOD: That doesn't appear on your map.  
136 (The witness indicated on the map.)

Mr. ROOD: Well, the railroad appears on the map, but the star route does not appear.

The WITNESS: There is no star route between Valdosta and Madison, as far as I know.

By Mr. ROOD:

Q150. Well, now, you say you have service authorized between Valdosta and Madison, but—

A. On the Georgia & Florida trains, but not by railway postal clerks.

Q151. Oh, I see.. Well, what do you have?

A. Closed pouch station. We mean by that, pouches are closed and dispatched over the train for intermediate offices.

Q152. And is closed pouch service identical to star route service?

A. It is not identical. It is comparable.

Q153. Comparable. Comparable in what way?

A. In that mail is dispatched from one post office to another with approximately the same speed, but star routes deliver the mail to the post offices, whereas in closed pouch space the mail is delivered at the railroad station.

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Q154. Now, the description which you have made of what actually happens on the southbound train—is that generally descriptive also in reverse, of what happens on the northbound train?

A. Generally so.

Mr. ROOD: Generally so. Well, that is good enough. I have no further questions of this witness.

Mr. HITT: No cross examination.

The COMMISSIONER: Very well. You may be excused.

The WITNESS: Thank you.

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Mr. ROOD: I have an exhibit here. Mr. Threadgill is here. We could stick this in as our Exhibit No. 2, which will be a tabulation of what he said about R. P. O.'s.

Mr. HITT: Well, so far as holding him is concerned, I don't care to cross examine him on it. I object to it as being irrelevant, but—

Mr. ROOD: Yes.

The COMMISSIONER: Mr. Hitt, let us mark this Defendant's Exhibit 2.

(Tabulation of R. P. O. routes connecting with mail service on the Georgia & Florida Railroad was marked "Defendant's Exhibit No. 2," for identification.)

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Mr. HITT: I object to it on the ground it is irrelevant and immaterial.

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The COMMISSIONER: This appears to be in substantiation of testimony which already has been ruled upon and on which an objection has been sustained, so the objection to this is sustained on the same grounds.

Mr. ROOD: Exception is noted.

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CHARLES H. STEPHENSON, a witness produced on behalf of the defendant, having been first duly sworn by said Commissioner, was examined, and in answer to interrogatories, testified as follows:

Direct Examination by Mr. Rood:

Q1. State your name and address and occupation to the Reporter, please, Mr. Stephenson.

A. Charles H. Stephenson. I am superintendent of the Division of Railway Adjustments, Post Office Department.

The COMMISSIONER: Adjustments?

The WITNESS: What is it?

The COMMISSIONER: Adjustments?

The WITNESS: Adjustments, yes. I have been in the Post Office Department for 35 years and connected with the mail.

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pay of railroad for that time.

40 By Mr. Root:

Q2. And you have been Chief of the Division of Railway Adjustments how long?

A. I have been Superintendent of the Division of Railway Adjustments for about two years, Assistant Superintendent for a year or so before that, and in the Department as Statistician for approximately thirty years.

Q3. Will you explain the function of the Division of Railway Adjustments in the Post-Office Department?

A. Our division has charge of the authorizations and pay to the railroad companies for the transportation of the mail, including the authorization and payment for power boat service and electric car service and mail messenger service, the air mail service from Alaska.

Q4. What is mail messenger service?

A. It is the transportation of the mail between post offices and railroad stations, and between railroad stations.

Q5. You mean railroad stations in the same town?

A. In the same town, yes.

Q6. Yes. Now will you describe the documentary procedure by which a railroad such as the Georgia & Florida Railroad gets a mail contract?

141 A. The Railroad Mail Service, that is, the Field Service of the Post Office Department, has control of the operation and the need of mail service on railroads and by other means. When mail service is necessary on a railroad, the railroad is requested to perform the service. They are authorized, usually—that is, in a great many cases the railroad seeks the service. We do not ask the railroad to put on additional cars or additional equipment for the transportation of mail, that is, except that which is regularly authorized from day to day. If the space that is needed for the transportation of the mail exceeds that which is regularly authorized, we do not compel a railroad to put on additional space just for that particular purpose. A recommendation is received from the field as to the units of space needed. That recommendation comes to the Post Office Department, to the General Superintendent of the Railway Mail Service, who either approves it or disapproves it, and then it comes to the Superintendent of the Division of Railway Adjustments for his approval or disapproval, after which it goes to the Second Assistant Postmaster General for his signature. Then it becomes a legal authorization.







Q7. You are referring to a document which you in the Post Office call an authorization?

A. Yes.

142 Q8. Do you have in your office the records of the authorizations issued to the Georgia & Florida Railroad?

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A. We do.

Q. Running as far back as the year 1928?

A. Yes, sir.

Q10. I hand you a folder of documents and ask you if you will describe just what those documents are, for the record.

A. These documents show the authorization of space on the Georgia & Florida Railroad beginning with July 10, 1928, and carrying through to, I presume, 1938. There are not very many changes on this road; therefore there are very, very few orders that are issued.

The COMMISSIONER: Are you going to offer that, Mr. Rood?

Mr. Rood: Just one further question:

By Mr. Rood:

Q11. Do you know why an order was issued on August 21, 1928?

A. Yes. That is putting into effect the order of the Interstate Commerce Commission dated July 10, 1928, which provides a rate: A general rate for railroads, of which this road is one.

143 Mr. Rood: Your Honor, the order of the I. C. C. to which he refers is cited in the Exhibit 1, at page 6, Defendant's Exhibit 1. That was the order giving a general increase in all railway mail rates, which was made effective from the date

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of the order. I offer this folder of documents for the record, requesting permission to withdraw and substitute copies, since these are original Post Office records.

Mr. HITT: No objection.

The COMMISSIONER: It will be omitted, and they may be withdrawn and photostatic copies substituted.

Mr. HITT: You will furnish us a set?

Mr. Rood: Oh, surely; photostatic copies.

The COMMISSIONER: In substituting photostatic copies be sure that they not reduced in size.

Mr. Rood: Yes, sir.

The COMMISSIONER: Sometimes we get a photostat and it is reduced so that it is very difficult to read.

Mr. Rood: This will be Defendant's Exhibit 3.

The COMMISSIONER: Three.

(Folder of documents, Division of Railway Adjustments, Post Office Department, was marked "Defendant's Exhibit No. 3," and made a part of record.)

144 The WITNESS: Off the record.

(Here followed a discussion off the record.)

Mr. Rood: Back on the record.

By Mr. Rood:

Q12. After this authorization has been issued and approved, what happens then, Mr. Stephenson?

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A. The railroads are given a copy of the notice of the authorization.

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Q15. After the authorization or this document is received by the railroad, I suppose they start supplying service in conformity therewith, and what is the next documentary step in the history of a particular case?

A. After the service has been performed they submit a bill to us, which we call an affidavit. They swear that this service has been—certain service has been performed in accordance with the authorization which they have received.

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which forms the basis of payment.

Mr. Rood: I ask that this folder of documents be 145 marked for identification as Exhibit 4.

(Folder of documents was marked "Defendant's Exhibit No. 4," for identification.)

By Mr. Rood:

Q16. I show you the documents marked as Exhibit 4, for identification, and ask you to describe them.

A. As I said before, this is a statement of service performed during—for a particular period, and this particular exhibit shows the bill for a three-month period. I will say this: That I wasn't able to get the affidavits for the larger runs of the road, for the reason that they were at Asheville, North Carolina, but for the purpose that we want to use them for I presume that these will be sufficient because they are similar. This shows the—

The COMMISSIONER: You say it is a three-month period?

The WITNESS: A three-months' period. Usually in the larger—

The COMMISSIONER: What period is that, Mr. Stephenson?

The WITNESS: Well, these run—this is for the quarter ending June 30, 1931, and, oh, various—various quarters subsequent to that.

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Q17. You are referring to a set of large documents which all appear to be identical in form. Now, on the back of those, at the back of the folder, there are some smaller documents attached. What are they, Mr. Stephenson?

A. Those are a part of the—those are similar to the rest of them.

Q18. All right.

A. They are all what we call affidavits, submitted for payment of service performed.

Mr. ROOD: I offer these for the record.

Mr. HITT: No objection.

The COMMISSIONER: They will be admitted. You wish, I suppose, to substitute photostats for those?

Mr. ROOD: With the same conditions.

The COMMISSIONER: Yes. Let them be fastened together securely, as Exhibit 4.

(Folder of documents; heretofore marked "Defendant's Exhibit No. 4" for identification, was made a part of this record.)

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(Here followed a discussion off the record.)

The COMMISSIONER: Very well. Go back on the record now.

147 Mr. ROOD: All right. Mr. Hitt, do you concede that the affidavits contained in Exhibit 4 are typical of all the affidavits furnished by your railroad and its receivers?

Mr. HITT: Yes.

Mr. ROOD: Covering all the service for which claim is made in this proceeding?

Mr. HITT: Yes, we are willing to stipulate that the other reports have been similar in character, in this same form.

Mr. ROOD: Let it be so stipulated by the defendant.

By Mr. ROOD:

Q19. Now, Mr. Stephenson, does the carrier compute the rates in these affidavits, or does the post office compute them?

A. The carrier computes them.

Q20. Well, now on what basis are the rates computed in these cases?

A. On the basis of the authorization.

Q21. And on what basis are the rates in the authorization made?

A. They are the rates established by the Interstate

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Commerce Commission.

148 Q22. Do these documents anywhere contain any protest or notation of protest by the carrier to the rates?

A. They do not.

Q23. Have you ever heard of any protest being made by this railroad about the rates to the Post Office Department, for services performed?

A. I would only say this: That in my conversation with the honorable attorney over there that he has indicated to me that they were not getting sufficient compensation. The COMMISSIONER: I don't get your word. Sufficient or insufficient?

The WITNESS: They didn't get sufficient compensation.

By Mr. ROOD:

Q24. And that is all you ever heard of?

A. Yes.

Q25. You have never had any written complaint?

A. No.

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Q34. Well, now, you say they recommend the trains. Do you mean the Post Office Field Service plots out what it considers a good train schedule and instructs the railroad to run a train on that schedule?

A. They do not instruct the railroad to run any trains.

149 Mail service is performed on the trains that they operate; they don't operate any trains particularly for mail service.

Q35. Do you mean that the Post Office Field Service merely adapts its schedules to existing railroad train schedules?

A. That's right.

Q36. Have you ever asked this railroad to run a train which it wasn't?

A. Not to my knowledge. That would come under filed service. But I know they wouldn't do that. At least, I haven't.



Q37. Have you ever—

A. It isn't a policy of the Department to do it.

Mr. HITT: May I inject a question there, so that the Commissioner may come back to it?

The WITNESS: Yes.

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Mr. HITT: You do confer with the railroads on the changes in schedules, as to what will suit the convenience of the Department? You consult them, and they take that into consideration in fixing schedules?

The WITNESS: Oh, yes. That is right, Mr. Hitt.

150 Mr. HITT: And that is done on the Georgia & Florida?

The WITNESS: Yes.

By Mr. ROOD:

Q38. Have you ever ordered any railroad to run a train which the railroad said it did not wish to run?

A. We have not.

. . . . .

I show you Defendant's Exhibit 2. Will you state into the record the railroads which provide the service on all the routes listed in Exhibit 2, and state whether or not the rates paid them are on the same scale as the rates paid the Georgia & Florida Railroad?

A. These railroads listed on Exhibit 2 all receive

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the same rate of pay, with the exception of one road, and that—

The COMMISSIONER: Will you check that exhibit number? I have a notation that Exhibit 2 is a tabulation of bus routes.

The WITNESS: With the exception of the Macon, Dublin & Savannah Railroad.

151 By Mr. ROOD:

Q41. That is the Macon and Vidalia R. P. O. route?

A. Yes, Macon and Vidalia R. P. O. Now, that railroad receives the rate for separately operated railroad under 100 miles in length, which is a higher rate of pay.

Q42. Well, now, on those routes that are shown in Exhibit 2, I see Atlanta and Jacksonville R. P. O. furnished by the Southern Railway, with mileage 330. Down below I see Atlanta, Valdosta, and Jacksonville R. P. O. furnished by the Georgia, Florida & Southern Railway, with mileage 349. Now, do you pay for that local route a higher compensation on mail carried from Atlanta to Jacksonville?

A. We pay the shorter mileage. The company has agreed to equalize the mileage. The Central of Georgia and the Atlanta Coast Line equalizes with the Southern Railway.

Q43. Are there any other illustrations of equalization in Georgia?

A. The Central of Georgia equalizes with the Southern  
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Railway between Atlanta and Macon, and the Atlantic Coast Line equalizes with Seaboard Air Line between Washington D. C., and Jacksonville, Fla.

Q44. Well, now,—

152 Mr. HITT: May I ask, what is the object of this line of questioning? Does this go to the same thing that was excluded yesterday, that there is no comparability between these routes?

Mr. ROOD: This shows that on R. P. O. service parallel railroads in the same place are willing to accept a still lower rate to get the business. The post office is under an obligation to pay the standard rates furnished by the I. C. C. Since that is so, the cheapest rate to the post office would be the short line; and lines which are longer than the short line, the cases just mentioned by Mr. Stephenson, voluntarily waive their rights to compensation for the mileage on their route which is in excess of the short line distance.

The WITNESS: That is for the through mail, through mail going over those lines only.

Mr. ROOD: Yes.

Mr. HITT: I appreciate what you are saying, Mr. Stephenson, and I object to the line of testimony because there is no line of comparability here with the Georgia & Florida. That is the ground of my objection.

The COMMISSIONER: The objection is sustained.

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Mr. ROOD: I offer to prove that other railroads operating mail routes carrying mail through the same towns which are served by the plaintiffs' routes are so anxious to get the

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business that they voluntarily come to the post office and offer to accept rates lower than the rates prescribed by the Interstate Commerce Commission. They do that by, I think, waiving compensation to mileage above the short line mileage.

By Mr. Roon:

Q45. Is that correct, Mr. Stephenson?

A. That is right.

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The COMMISSIONER: Very well. The objection is sustained. You may make your offer of proof.

Mr. Roon: Yes. I offer to prove through this and other witnesses that—

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The COMMISSIONER: Through this witness.

Mr. Roon: Through this witness, then: That if the post office decided not to ship mail over the Georgia & Florida Railroad, but used the Star Routes exclusively, and the other railway routes which were shown to serve every stop yesterday except two, that the post office would make an annual saving not only of the amounts paid the railroad for the R. P. O. and the closed-pouch service, but also all of the amounts shown in column 3 of Exhibit 6, and a large percentage, between a third and a half, of the amounts shown in column 4 of Exhibit 6.

Q59. Mr. Stephenson, how many times has this railroad asked to be relieved of the burden of carrying mail?

A. They haven't asked at any time to be relieved.

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JOHN D. HARDY a witness produced on behalf of the defendant, having been.

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first duly sworn by said commissioner, was examined, and in answer to interrogatories, testified as follows:

Direct Examination by Mr. Roon:

Q1. Mr. Hardy, will you tell us who you are and what you do?

The COMMISSIONER: Give your name for the record, first.

The WITNESS: John D. Hardy.

The COMMISSIONER: John D.?

The WITNESS: John D. General superintendent, Railway Mail Service, Post Office Department.

Q2. Mr. Hardy, how long have you been general superintendent?

155 A. Six years.

Q3. And who was your predecessor?

A. Mr. S. A. Cisler.

Q4. You say your title is superintendent of the railway  
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mail service. Now, specifically, just give us a general description of what your job is, and what you actually do in connection with railway mail.

A. Well, the position of general superintendent, railway mail service, has supervision over all of the railway mail service throughout the country. That includes the personnel as well as the supervision of space on R. P. O. and closed-pouch trains; also the supervision of the division of Star Route service, which is a service rendered by contract entered into by means of advertisements for bids for four-year period of service. The Railway Mail Service is divided into 15 divisions with division headquarters, and each division is divided into chief clerk districts, and each chief clerk in his respective district has immediate supervision over the administration of the service in his respective division. He perfects the organizations of R. P. O. trains and of other organizations, he submits the recommendation for change in organizations, changes in space, in accordance with the I. C. C. rulings. As those recommendations come into the Department from the field, we examine them and pass upon them.

156 Q5. Now, Mr. Hardy, you, then, are in charge of all the planning for use of railroads by the post office in the entire country?

A. Yes, sir.

Q6. Yes. Now, how does the—what are the steps which  
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lead you to decide to use a railroad for a mail route? I don't mean what are your mental steps, but what is the procedure when—does it start with negotiations, or where does the idea start, and how does it get to you, and what is your function?

A. Well, primarily all railroads are post routes, but as new railroads are built up or extended, the railroads make application to the Department for the establishment of a mail route on that extension or branch of the line.

For instance, the Seaboard Air Line a few years ago built a road from—into Miami.

Q7. That is in Florida.

A. New construction. And they made application to the Post Office Department for the establishment of a mail route over that portion of the new road; and it is our duty, jurisdiction, to consider the need or benefit of that service, the benefits to the public, as commensurate with the

cost to the Department, and either establish the route or deny the application.

157 Q8. Now, you are familiar with the railway service, are you—the railway mail service performed by the Georgia & Florida Railroad?

A. Generally speaking.

Q9. Can you recall when the question of the Georgia & Florida mail routes first came to your attention?

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A. In 1939, shortly after I became general superintendent.

Q10. Oh, I see.

A. There was a recommendation submitted by the field officials having immediate supervision of that service for a curtailment of the railway post office service over a portion of the route to be superseded by closed-pouch service. At that time the Department was making a survey of all minimum pay routes and all mixed train service.

Q11. What do you mean by "mixed train service"?

A. A train which carried mixed traffic, that is, passenger and freight.

Q12. Passenger and freight. Not merely passenger and baggage?

A. No.

Q13. But passenger and freight.

A. Passenger and freight.

\* \* \*

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The WITNESS: I don't believe that I had finished my statement.

Mr. ROOD: No. You were talking about mixed train service.

The WITNESS: Mixed train service.

Mr. ROOD: I interrupted you to ask you to define "mixed train."

The WITNESS: The object of that survey was to determine whether the service to the public on mixed-train service, which is necessarily very slow on account of the mixed traffic, the average speed of the train, was satisfactory to the patrons of the line. As a result of that survey, some R. P. O. routes and some closed-pouch routes were discontinued. This particular route, the field officials recommended a discontinuance of R. P. O. service over a portion of the route to be superseded by closed-pouch service, but in connection with the recommendation of the field, the Department received a number of petitions and protests from the patrons along the line, as well as the officials of



the railroad, urging the continuance of the R. P. O. service on the grounds that, if there was any curtailment of the service made, it would possibly jeopardize the continuance of the railroad. And, in view of that protest or the many

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protests, I ordered the case filed with no action taken.

159 I might add that the most—probably the determining factor in my decision was the fact that the railroad company pleaded that we continue the service because of the financial benefits that were accruing to the railroad, and that has been one of the policies of the Department, that in considering any curtailment or discontinuance of rail service, is to first make inquiry of the railroad company as to what effect upon the finances or the operation of their railroad any such curtailment would have, and we are invariably governed in our decision by the plea of the railroad in response to our inquiry.

By Mr. Roop:

Q14. Do you mean that you occasionally spend more money for mail service than the economics of the situation actually require you to spend?

A. Yes, but the economy is not the determining factor. The Post Office Department is obligated to render a satisfactory service to the public. If the railroad companies provide that service, there is no disposition on the part of the Post Office Department to supplement that service by contract service, or other means, but frequently the schedules of train service are such that the train service does not provide an adequate service, and the public complains because of the late running of trains or the late arrival or the earlier departure.

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which requires the Department to supplement that service, or in cases to supersede the service by what we call a Star Route service, which is established upon schedules that are fixed by the Department.

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Mr. Roop: This witness will testify that under existing laws he is able to pay rates to this railroad higher than the rates fixed by the I. C. C., and that he does make special contracts with railroads to carry mail service when they protest about the rates and say they are not adequate and they have to have more money.

The COMMISSIONER: Go ahead. State.

The WITNESS: Your Honor, there is a provision of law, 39 U. S. C. 565, which carries precise laws and regulations, which read—

The COMMISSIONER: What is that? 39, you say?

The WITNESS: 39 U. S. C. 565, which reads:

"The Postmaster General is authorized to make special contracts with the railroad companies for the transportation of the mails where in his judgment the conditions warrant the application of higher rather than those herein specified, and make report to Congress of all cases where such special

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contracts are made and the terms and reasons therefor."

Now, I presume to state—

Mr. ROOD: Well—

The WITNESS: I assume, at least, that that bill was passed in order to take care of such cases where the Interstate Commerce Commission rules limited the Post Office Department in their payment to the railroads. As you say, we are—the rates are fixed by the I. C. C., and we are obliged to compensate the railroads on the basis of those rates. But if any railroad feels that those rates are not sufficient they have the right, under the provisions of this Act, to apply to the Postmaster General for relief in the way of a special contract under the provisions of that Act, and to my knowledge this railroad has never applied to the Postmaster General for relief under that provision.

Mr. HITT: You mean, you say, to your knowledge, or so far as you know?

Mr. ROOD: He said to his knowledge.

The WITNESS: Well, so far as I know.

Mr. HITT: Yes. That is to say, you don't mean to say that they never did?

The WITNESS: Oh, no, sir. I do not know.

Mr. HITT: You don't mean to say you know that they never did?

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The WITNESS: I mean to say that I can't say positively

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that they never have. I said to my knowledge they have not.

Mr. HITT: Well, now, let me ask you this question: Although this power has been in the Act ever since it was enacted in 1916, in how many instances have you authorized special contracts?

The WITNESS: Well, we have several of them.

Mr. HITT: Well, several. Can you name which they are, and how many of them, without what limit?

The WITNESS: Well, we have the Colorado Southern, the Louisiana & Arkansas.

Mr. STEPHENSON: Rio Grande Western; Manhattan—

The WITNESS: Manhattan-Hudson.

Mr. STEPHENSON: —Hudson.

Mr. ROOD: Was it Manhattan?

Mr. HITT: There are three.

Mr. STEPHENSON: The two railroads in Alaska: The Alaska Railroad and the Alaska—the—

The COMMISSIONER: We are getting the record in quite a bad situation here.

The WITNESS: Yes. Mr. Stephenson would be in a better shape to give the itemized record of those special arrangements.

Mr. HITT: The point I want to bring out, Mr. Commissioner—and perhaps I had better reserve it to a little later—was the fact that it has been, so far as we have

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understood and were told, the policy of the Department had been not to make special contracts except in very special circumstances, like the Rocky Mountain roads, peculiar conditions there.

Mr. ROOD: Well, you can ask him that on cross-examination.

The COMMISSIONER: We were discussing the admissibility of this evidence.

Mr. ROOD: Yes. We are going to show that this seller was a willing seller.

The COMMISSIONER: I have a very great deal of doubt. As a matter of fact, I think we will adjourn until 2 o'clock. I want to look into it a little bit.

Mr. ROOD: It is perfectly true that our contention may make new law in the Supreme Court, but we have no—

The COMMISSIONER: Well, it won't make new law with me. I follow the Supreme Court.

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Q15. I show you a document and ask you to describe it.

A. This is a communication addressed to the superintendent of passenger transportation of the Georgia & Florida

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Railroad under date of October 10, 1938, to the effect that consideration was being given to some change in the authorized service, and making inquiry as to what effect, if any, loss of mail revenue to the railroad company would have on that company.

Q16. And did the company reply to that letter?

The COMMISSIONER: Let us get it marked.

Mr. ROOD: All right. I will offer this as an exhibit.

The COMMISSIONER: Mark it Defendant's Exhibit 7.

(Carbon copy of letter dated October 10, 1938, from Chief Clerk, District 8, to Mr. L. R. White, was marked "Defendant's Exhibit No. 7," for identification.)

The COMMISSIONER: It will be admitted.

By Mr. ROOD:

Q17. And did the railroad reply to that letter?

A. Yes, sir.

The-REPORTER: Did you say it would be admitted?

The COMMISSIONER: Well, Mr. Hitt, now we are going into this matter to which you wanted to make your objection at the proper time. In other words, this first letter starts out the train of thought upon the request of the railroad for continuance of the service.

Mr. HITT: Mr. Commissioner, we want to enter an  
165 objection to this testimony as to what occurred in  
1939, which is subsequent to the period to which this  
proceeding relates, and

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it seems to me that it is entirely irrelevant and immaterial to the particular proceeding here.

The COMMISSIONER: I do not have my copy of the amended petition here. I thought it ran up to about—for what period are you claiming, Mr. Hitt?

Mr. HITT: Let's see. Six years. It was 1938, wasn't it?

Mr. STERN: To February 28, 1938.

Mr. HITT: This was subsequent to that time, February 28, 1938. The exhibit to which he has referred is October 10, 1938.

The COMMISSIONER: I should think that would not be relevant. I assumed that you had the material during the period involved; that is, I had assumed that you had evidence as to the period involved.

Mr. STERN: Off the record, your Honor, I don't know. No plea of the statute of limitations was made in that petition.

(Here followed discussion off the record.)

Mr. ROOD: Your Honor, this is the final phase in an investigation which began, I think, in 1937, and this line of testimony is designated to show the function and the value of the service at the time the investigation was made. Now, the investigation—

The COMMISSIONER: Well, let me see the letter a minute.

Mr. STERN: Oh, is that the letter? What is the date of that letter?



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The COMMISSIONER: May I see that Exhibit 7?

(The document referred to was handed to the Commissioner.)

The COMMISSIONER: On the face of those two letters, they all deal with a time prior to the time mentioned in the petition, as I gather it. Perhaps there were investigations started sooner, but apparently the first knowledge of this is brought to the plaintiff in October 10, 1938, and he replied on October 25, 1938.

Mr. Rood: Of course, his last paragraph on the first page cites operating reports and financial condition for the first nine months of 1938. We will offer—we will show that this investigation did begin in 1937, and we will also show that the physical conditions and the economic conditions and the traffic handled on this route at this time were similar to the conditions that prevailed all the way back. We are going to show that by traffic counts and regular inspection reports made on the route, going back as far as 1931.

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Mr. Rood: Well, I offer that letter in evidence that you have in your hand.

The COMMISSIONER: Yes, I know, but what I am saying is that on the face of them they are not admissible, are they?

Mr. STERN: Will your Honor receive them subject to connection after we lay the foundation?

The COMMISSIONER: Well, now, that is all right. Now, I am not quite clear. It is not quite clear to me just what the connecting thing is going to be.

Mr. Rood: The connecting thing is going to be a statement showing that all the conditions were similar for the years immediately preceding, going back as far—for the full period of this petition.

The COMMISSIONER: Well, assume that is true: How does it make this action in 1938 an admission as to those earlier years?

Mr. Rood: It is evidence as to the importance and the value of this route.

The COMMISSIONER: I will withhold the ruling until any further—

Mr. Rood: All right. I offer—

By Mr. Rood:

Q18. I ask you if that is the reply that you received from the railroad.

A. Yes, sir.







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Mr. ROOD: I offer that in evidence.

Mr. HITT: I make the same objection.

The COMMISSIONER: Let it be marked Defendant's Exhibit No. 8, and I will just reserve ruling on that until it can be determined whether or not—

Mr. HITT: May I see a copy of that?

The COMMISSIONER: What is the date of that, Mr. Reporter?

The REPORTER: October 25, 1938.

The COMMISSIONER: Ruling is reserved.

(Two-page letter, dated October 25, 1938, from I. R. White to Chief Clerk, District 8, Railway Mail Service, was marked "Defendant's Exhibit No. 8," for identification.)

Mr. ROOD: I ask that this document be marked for identification.

(A group of papers was marked "Defendant's Exhibit No. 9," for identification.)

168 By Mr. ROOD:—

Q19. This is our Exhibit 9. I show you Exhibit 9, and I ask you what it is.

A. This is a recommendation submitted by the field officials of the Railway Mail Service reporting—

The COMMISSIONER: Recommendations to whom, Mr. Hardy?

The WITNESS: Recommendation to the general superintendent of the Railway Mail Service.

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The COMMISSIONER: Yes.

The WITNESS: Reporting the result of a survey made of the service on the Augusta & Madison R. P. O., in compliance with a circular letter issued by the general superintendent, Railway Mail Service, under date of September 8, 1937. In this recommendation—

The COMMISSIONER: Well, before you go to that, let us just hold it a minute.

Mr. ROOD: Oh, I offer this in evidence.

Mr. HITT: This recommendation is dated June 21, 1939, a still later date than the one that has been referred to, and does not relate to the period here that is affected in this proceeding, and we object to this as being irrelevant and immaterial.

The COMMISSIONER: May I see a copy of this?

The WITNESS: Yes, sir. That is a report, your Honor, on that letter that was sent out.

Mr. ROOD: The thing that we are particularly concerned with is, of course, a lengthy discussion and

analysis of the route and the performance on the route, which is reported in that report to the General Superintendent, but which was, of course, made much earlier.

The COMMISSIONER: I am going to reserve ruling on that, also, to see whether or not something turns up that will make it admissible.

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Mr. Rood: All right, your Honor.

The COMMISSIONER: That is the only ground of your objection, is it, Mr. Hitt?

Mr. HITT: Yes. It is just irrelevant and immaterial to the case.

The COMMISSIONER: All right.

Mr. Rood: Off the record.

(Here followed discussion off the record.)

Mr. Rood: Now, this was the recommendation to discontinue part of the R. P. O. Service and to convert to closed-pouch service. That has been earlier testified.

By Mr. Rood:

Q20. Did that document show the condition of the route during 1938 and 1939 in such a way that you—

Mr. HITT: Mr. Commissioner, I am going to object to the testimony that goes along with this, but if you want to reserve ruling on that and let him go ahead and get it on the transcript, why, I have no objection to that; but I wanted it to be understood that my objection also goes to the testimony that goes with the exhibit.

The COMMISSIONER: Yes, it will be understood that your objection goes to any testimony connected with the exhibit.

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Q21. Did this document show that the post office could save any money by altering this route?

A. Yes, sir.

Q22. How much could be saved?

A. There would be a saving of \$4,870.56 for space, and a saving of \$2,450 for clerk hire, and \$90.69 for travel allowance to the clerk, making a total net saving of \$7,685.

Q23. Is that on an annual basis?

A. Per annum.

Q24. Yes. Was the service found to conform to schedule and to be adequately prompt?

A. No, sir. The reason that the field officials submitted this recommendation was on account of the irregular operation of the mixed trains, which resulted in a delayed delivery of mails to the offices on the route.

Q25. Now, can you express any opinion as to the value of the railroad's service to the post office at the time you were considering that report?

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A. Well, we did not consider that the service rendered by this route met the standard or requirement of service on comparable lines on which we were paying the same rate of pay.

The COMMISSIONER: Are you speaking as to what the report shows, or is this—you are speaking as to what you know?

The WITNESS: The report shows that, as well as that was the opinion of the Department in the findings.

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By Mr. Rood:

Q26. Yes, now, was that your opinion?

A. Yes, sir; that the service was not worth what we were paying for it, but at that time we established a policy that we would not curtail or discontinue mail pay to any railroad which protested or objected to the loss of mail revenue. As a good business proposition, we should have discontinued or curtailed the service, but we had—

The COMMISSIONER: What I am trying to get at, Mr. Hardy, are you testifying now as to what you know from your experience in the Department at that time, or are you simply testifying as to what you gathered from that report?

The WITNESS: I am testifying, your Honor, to what is contained in this report which reflects or is in reply to a circular letter or policy enunciated by the Department, to make investigations of all mixed train service to ascertain whether such service could be curtailed or discontinued.

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Q27. Now, Mr. Hardy, this report was directed to you, was it not?

A. Yes, sir.

Q28. You were the Head of the Railway Mail Service at that time?

A. Yes, sir.

Q29. And did you apply your judgment to what the report contained?

A. Yes, sir.

Q30. And was it your judgment that on the facts stated in the report that service was not worth what it was costing?



A. That is true:

Q31. Now, tell us what some of the considerations were that led you to that conclusion, aside from the poorness of the service. That is, was there other service alternately available?

A. There was other service available, but the determining factor was the receipt of this voluminous correspondence in the form of protests.

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By Mr. Rood:

Q32. Now, wait a minute. I don't mean the determining factor in your decision to keep it going, but I mean the determining factor in your opinion that it really wasn't worth what you were paying, but, nevertheless, despite that opinion, you decided to keep it going.

Now, when you decided that it really wasn't worth economically what it cost, what were some of the considerations which entered into that decision?

A. The Department uses an inspection form for all R. P. O. train service. Field officials are required to make periodical inspections of every R. P. O. train to determine what the conditions are in those trains: The volume of mail, maintenance of schedule, and whether the service justifies the expense. We reserve these reports on a run of this type once every two years. These reports give detailed information as to the number of pouches received en route, the number of letter packages distributed from those pouches, the number of sacks of papers, the number of registers; and it is very simple to determine the value of an R. P. O. service from a careful study of these inspection reports.

Q33. Mr. Hardy, was such an inspection report attached to the report of your Atlanta office?

A. Yes, sir.

The COMMISSIONER: Exhibit No. 9, you are referring to?

Mr. Rood: I refer to the last two sheets of Exhibit No. 9,  
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which I just handed you (addressing Mr. Hitt).

174 The WITNESS: These reports were prepared in connection with a personal inspection made by the chief clerk, Railway Mail Service, of Train 4 between Valdosta and Augusta on May 18, 1939, and on Train 5 between Augusta and Valdosta on May 19, 1939. Train 4, it shows that on a run of 223 miles, consuming eight hours and forty minutes—

The COMMISSIONER: You mean these runs were made in 1939?

The WITNESS: Yes, sir; this inspection was made.

The COMMISSIONER: Well, is that inspection made from former records or a sample run, or something of that kind?

The WITNESS: These inspections are made—we require our field officials to make on the lighter runs an inspection every two years, complete inspection; and on the medium runs once a year; and on the heavier runs—

The COMMISSIONER: Well, now, when you say so many bags of mail were carried on a run, you are referring to a run that was made—

The WITNESS: That was a run on this date, this particular date.

The COMMISSIONER: In 1939?

The WITNESS: Yes, sir.

The COMMISSIONER: I think that we shouldn't go on and fill the record with material as to what happened on an inspection run in 1939.

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Mr. ROOD: No, your Honor; we are going to introduce inspection reports on this route which will date back: 1937, 1935, 1933, and 1931.

175 The COMMISSIONER: Perhaps they are competent, but I am referring to what physically happened in 1939, and I do not see that that is competent.

Mr. ROOD: We will show that what happened in 1939 was the same as what was happening in the earlier years.

The COMMISSIONER: Well, is it material what happened in 1939? That is the point.

Mr. ROOD: The thing that is material is what happened in the earlier years, and if we can show that by showing that it was the same as what happened in 1939, and that what happened in 1939 produced this careful analysis and this value judgment—

Mr. STERN: His basis for his opinion, your Honor.

Mr. ROOD: —then we think his opinion as to the value, on those facts, showing the same facts existing in the earlier years, by connecting up, is relevant.

The COMMISSIONER: The only opinion he has expressed yet was that in 1939 he came to the conclusion that on the basis of this report it wasn't feasible.

Mr. ROOD: Well, we will—

The COMMISSIONER: Now, maybe you are going to ask him is his opinion that it was no good in 1935, but you haven't asked him that yet.

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Mr. ROOD: No; we have not been able to locate the records for 1935 yet, but they are on the way. We had an air mail voucher this morning.

The COMMISSIONER: I don't know why you are going in the back door always on these things.

Mr. Rood: Well, I shall now withdraw Mr. Hardy from the stand, subject to recall later, in order that we may be able to locate those earlier reports, and in order also that I can put Mr. Hansbury on the stand, who has to get a transeontinental train.

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EMIL J. BINET, a witness produced on behalf of the defendant, having been first duly sworn by said commissioner, was examined, and in answer to interrogatories, testified as follows:

Direct Examination by Mr. Rood:

Q1. Mr. Binet, will you state your name and address for the record?

A. My name is Emil J. Binet, Washington, D. C.

Q2. What is your occupation?

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A. I am an accountant and analyst with the Bureau of Transport Economics and Statistics of the Interstate Commerce Commission.

Q3. How long have you been doing that?

A. About five years.

Q4. What were your previous occupations?

A. Prior to my present position I was an auditor for the Bureau of Accounts of the Interstate Commerce Commission, with duties auditing and checking the accounts and records of steam railroads. I held that position for a matter of about nine years, and prior to that I held the position as auditor for Minnesota, Dakota and Western Railway Company, at International Falls, Minnesota, for a period of about three years; and for a period of nine years prior to that position I was Chief Accountant for the St. Paul Port & Terminal Railway Company, at South St. Paul, Minnesota.

Q5. What does the nature of your actual work in the Interstate Commerce Commission with respect to railway accounts consist of?

A. My duties with the Cost Section of the Interstate

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Commerce Commission are to review cost data in rate cases, and to prepare cost data for various studies that the Section undertakes, to establish in connection with all

rate cases all over the country for railroad and motor carriers.

Q6. Have you had experience auditing railway accounts?

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A. Yes, sir; extensive experience with many, many large Class I railroads over the United States.

Q7. Name some of the railroads.

A. Starting in the east, New York, New Haven & Hartford, Pennsylvania Railroad, the Nickel Plate, the Missouri Pacific, the Great Northern, the Northern Pacific, the Union Pacific, the Atlantic Coast Line, Southern Railway, and various roads in Texas such as the Denver—with the roads out of Colorado, Denver & Rio Grande Western, Colorado & Southern, Denver & Salt Lake, and affiliated corporations; the Missouri, Topeka & Santa Fe, and the Southern Pacific, Chesapeake & Ohio, and the Richmond, Fredericksburg & Potomac. Is that enough?

Mr. ROOD: Yes.

The COMMISSIONER: Proceed.

By Mr. ROOD:

Q8. Have you had specific experience in the analysis of cost of railroad operations?

A. Yes, sir.

Q9. Have you participated in such studies in abandonment cases.

178 A. Yes, sir; I have.

Q10. What are some of the abandonment cases?

A. In the Illinois Central, I participated actively in the analysis of cost data in that case, during which I

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reviewed the Commission's files and records on a number of other abandonment cases; the Rock Island, and the Erie.—I cannot remember all of them.

Q11. In those abandonment cases what were the issues at stake?

A. The issues at stake were that the carriers who desired to abandon a segment of their line, usually a branch line, approached the problem by showing what their loss in revenues would be from the abandonment of the segment, and the saving in expenses which would result from the abandonment and, of course, their figures invariably showed that there was a tremendous saving to be effected as the result of the abandonment.

In accumulating and preparing the costs that they would be saved following an abandonment, they use and were required to use those expenses which were out-of-pocket and would be saved in the event of abandonment. In other

words, those expenses that could be directly assigned to that particular line or segment of property that they proposed to abandon.

Q12. Is that the same as the added cost of running that branch?

A. That is my understanding; it is.

179 Q13. Two phrases describing the same thing?

A. Yes, sir.

Q14. Have you gone over the Plaintiff's statistical exhibits in this case?

A. Yes, sir; I have.

Q15. Have you examined them to see what costs they show as being cost of carrying the mails?

A. Yes, sir; I have.

Q16. Have you formed an opinion?

A. Yes, sir; I have.

Q17. What is your opinion?

A. My opinion is that the carrier, in the exhibits that I have reviewed, did not make any attempt or did not show any expenses that were directly identifiable or assigned to the transportation of the mail. They have used, in effect, statistical car foot miles in the apportionment of all expenses and railway tax accruals, and equipment, and joint facility rents.

. . . . .  
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Q20. In your opinion what costs have been shown in these exhibits as cost of carrying the mail?

A. These exhibits do not directly assign any costs to carrying the mail. They do not identify any expenses incurred solely from carrying the mail.

Q21. By examining these exhibits can you form an opinion as to what those costs were?

A. I cannot.

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Q22. You cannot form an opinion?

A. Not as to the expenses solely related to carrying the mail.

. . . . .  
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Q29. These Trains Nos. 4 and 5 have been shown in the Plaintiffs' exhibits as containing a 15-foot compartment for Railway Mail Service.

What would be saved if they did not have to run that 15-foot compartment for Railway Mail storage?

A. And continue to operate the car?



Q30. Can you tell whether they would continue to operate the car?

A. No, I cannot. If they continue to operate the car and do not provide any mail service in this 15-foot compartment, in my opinion there would be no savings, or an inconsequential one.

Q31. Have you examined these accounts furnished by the plaintiffs, with specific reference to the question as to whether or not a car could be saved on those trains?

A. I have approached the matter in that light; yes, sir.

Q32. You have had opportunity to find out from the

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plaintiffs' exhibits whether they could save a car?

A. Yes, sir.

Q33. Have you formed an opinion about that?

A. In my opinion, I do not think that if mail service were abandoned over the entire line that it would make

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181 any difference in the operation of the car in which the 15-foot compartment was used for transporting the mail, since the remainder of the car was used for the carriage of baggage and express.

Q34. Well, how many passenger train cars do the accounts show that trains Nos. 4 and 5 normally carry?

A. The carrier's exhibits show that each of trains 4 and 5 carry two regularly assigned passenger train cars, one of which was a full passenger coach and the other a combination car containing a 15-foot R. P. O. compartment authorized for the mail service.

Q35. How many freight cars were included in the train?

A. The carriers' exhibits do not show any freight cars.

Q36. Were there freight cars?

A. I understand trains 4 and 5 were mixed trains, carrying predominantly freight?

Q37. You mean that is your opinion?

A. No, I rely on the fact that a witness for the Post Office Department inspected the trains, the main line

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operation of trains 4 and 5 in 1935, I believe, and testified that the train contained perhaps about eight freight cars, and further than that, I reviewed correspondence in the Bureau of Statistics' Annual Report files wherein the question was raised with the carrier as to whether it

operated any passenger train service, as such, and  
182 the carrier informed the Bureau

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that during, at least the years 1936 and afterward, it operated no regularly scheduled passenger train service.

Q38. And from that you concluded these were mixed trains?

A: Yes, sir. I also know from the fact that the carriers' Annual Reports for the years 1936 and thereafter show its expenses with the exception of a small minor amount charged entirely to freight train service, which is in accordance with the Commission's rules that if the mixed train is preponderantly freight it should be classed as freight.

Q39. Do you conclude from that that these mixed trains were predominantly freight?

A. Yes, sir.

The COMMISSIONER: Is there any question that the trains were predominantly freight?

Mr. HITT: I don't know whether they were predominantly freight, but they were trains the Post Office Department used in making the test for 28 days in 1931. That was the test period, and that formula was followed as the one agreed upon.

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between the Post Office Department and the carriers.

In 1935 the Post Office Department did not know any better way to arrive at a proper separation of freight and passenger expenses, to determine what portion of the passenger service should be charged to mail.

The COMMISSIONER: Go ahead.

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By Mr. Rood:

Q40. Can you refer to any place in the annual reports that you may have with you, which show that those trains were listed as mixed trains and predominantly freight, or any data from which you make that conclusion?

A: I can show the 1937 Annual Report to the Commission, from which it will be seen that the expenses are, with the exception of a few very minor amounts, charged to freight train service.

Q41. Can you do that now?

A. Yes, sir.

Mr. HITT: I think we can admit that, because we had to make an Annual Report the way the Commission requires it, and most of the cars were predominantly freight, which resulted in our reporting expenses for freight train operation for those years. I take it that that is a foregone conclusion. I don't see why you would have to go to the trouble of proving that.

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Q43. Do you find in these exhibits any statement by the carriers which indicates that they could have cut one of

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these cars except the mail?

A. No, sir; I did not find any such statement in the exhibits.

Q44. You said it was your opinion you could not cut a car.

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Let me ask you this: Why couldn't they cut the full passenger train car?

A. Well, based on these exhibits and the statistical data furnished by the carrier, if the combination car containing the R. P. O. compartment was eliminated it would follow, or it would seem to follow that the baggage and express also carried in that combination car would have to be carried in the full passenger car coach. In order to do that it would be necessary to eliminate or remove some of the passenger seats in the 4 and 5 passenger coach.

Now, the exhibit showed that on the average the passenger coaches can accommodate from 50 to 66 passengers.

The COMMISSIONER: You mean they carried that much?

The WITNESS: They accommodated that much; that is the capacity, 50 to 66 passengers.

Mr. ROOD: Now, wait a minute. That is shown, your Honor, in Exhibit 10 of the printed proceedings.

The WITNESS: For convenience, we will take the figure of 60 passengers as the capacity of this full passenger coach, which would mean that there would be 15 seats on each side of the train, as I see it.

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By Mr. ROOD:

Q45. Fifteen double seats?

A. Yes, on each side of the aisle. As I also see it, the passenger trains in the southern states, and probably Georgia in particular, segregate a section for the

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colored passengers and the white passengers, which would mean that the car would require a separate section for either the white or the colored to be compressed to a point not practicable if certain of these seats were removed in order to allow or to permit the carrying of baggage and express in such passenger car.

Q46. You mean if they had a compartment between the colored and white, the two compartments equal in size,

there would be seven or eight seats on each side for the white passengers, and seven or eight seats on each side for the colored passengers.

A. If they were equally divided between the white and colored.

Q47. Now, do you know that these trains carried passengers?

A. Yes, sir.

Q48. Do you have any indication as to the passenger traffic of this railroad?

A. Yes, sir; as taken from the carriers' annual

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reports.

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Q73. To sum it all up, Mr. Binet, is your conclusion that they would be likely to cut a car or they would not?

A. In my opinion they would not be likely to remove a car in the event of the elimination of the mail service, and continuing to carry baggage and express on that train.

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Q74. If they did not remove a car how much cost would they have saved if they had not carried mail?

A. As I said before, if they continue to operate the two cars on these trains, each train, the amount of saving in my opinion, based on the carrier's exhibits and known figures, the saving would be inconsequential.

Q75. You mean, by inconsequential, what sort of figure?

A. Oh, well, making the bill against the Government, postage, stamps, and maybe repairs occasionally to that part of the car used for a mail compartment.

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Binet—Direct

Q81. I guess my question was not clear. You say it is your opinion they could not have saved any cars at all?

A. That is correct.

Q82. But you are not certain about that?

A. I am reasonably certain they could not have saved anything but an inconsequential amount.

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Q102. Now, I show you Defendant's Exhibits 13 to 20, as marked for identification, and ask you to describe them generally.

A. These are statements showing for each of the years 1931 to 1938, inclusive, the computation of the added expense incurred by the Georgia & Florida Railroad in transporting combination cars containing RPO compartments, based on the assumption that the elimination of the United States Mail Service would result in the elimination of such cars from transportation service.

In preparing these statements we have included in the computations only those expense accounts which in our judgment, and from our experience, we conclude contained items of expense which the carrier would obtain some saving in the event one car were removed from each train in the transportation service.

You will note in Column A on Sheet 1 of these statements we list the various expense accounts as prescribed for steam railroads, and in column B we show the total expenses as taken from the carrier's annual report.

188 In Column C we list or show the out-of-pocket portion of the expenses in these various accounts, which percentages were obtained from Senate Document No. 63, of the 78th Congress, First Session, this document being a report of the studies made by the Cost Section of the Bureau of Transport Economics and Statistics, in connection with the rail transportation.

The COMMISSIONER: Let me ask you something about that. Are those cost studies used in the Interstate Commerce Commission, in its daily work?

The WITNESS: Yes, sir, very, very much so, in numerous instances.

The COMMISSIONER: For the purpose of valuation or rate making, or what?

The WITNESS: For the purpose of assisting the Commissioners and the Examiners primarily, in rate cases and allied matters.

By Mr. Rood:

Q103. How about abandonment cases?

A. Well, the Commissioner asked me whether our cost studies, as reflected in Senate Document No. 63 are used in abandonment cases, and I can't say that is the case, Mr. Rood. They are used in many, many different types of work for the Commission, and the Commission's Examiners, having to do with rate cases and the cost of transportation generally.

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to show that level below which rates should not fall.

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Q158. Now, Mr. Hitt brought up the point that this is not actual in the sense you do not get down on the railroad and watch the operations during that period, and you took all the basic original figures from the railroad's annual report.

Does the Commission certify that those annual reports are correct?

Q159. Do you believe them to be correct in this case?

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The COMMISSIONER: I don't think that makes any difference. They are admissions. If he does not, then his whole testimony is out. He is just giving an opinion based on them. You had better not ask him that question. You might get a wrong answer.

Mr. Rood: I will withdraw the question.

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By Mr. Rood:

Q174. Do you think that the basis as used in Exhibits 12 to 20 is a better estimate of cost of carrying mail in this proceeding than the basis used in the plaintiff's exhibits?

Mr. HITT: I object.

Mr. Rood: He is an expert.

The COMMISSIONER: You are putting up to him the very question the Court has to decide. Objection sustained.

Mr. Rood: I think I will except to that.

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Mr. Rood: Will you read the last question?

(Thereupon, the Reporter read the question last propounded, as above recorded.)

The COMMISSIONER: I said the question was objectionable, but on hearing it again, I believe I will withdraw the ruling and let him answer it.

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Q175. Directing it to cost, do you think your measure of the costs is a better one than the plaintiff's; your basis, that is, your added cost theory, rather than the apportionment?

A. Yes, I say it is a more fair, better basis, far better approximation for calculation of the actual cost of transporting the mails than the carrier's method, which did not state that there was any attempt to make a calculation or computation of actual cost of carrying the mail, in that they merely applied a car foot mile ratio to all expenses.

regardless of what they were.

Q176. You say the Commissioners used this basis in determining costs in other cases?

A. Used what basis, Mr. Rood?

Q177. Your basis.

A. Well, I would not want to make it as specific as that. The Commissioners depend upon the case and the circumstances. The abandonment proceedings are usually, in fact almost invariably, predicated upon the revenue that the carrier receives from the line to be abandoned and the out-of-pocket expenses of handling the traffic over the line to be abandoned.

Does that answer your question?

Mr. Rood: Yes.

191 Mr. HITT: May I inject there, has such a study identical with this been made by any other carrier for any other purpose?

The WITNESS: I never made one.

Mr. HITT: Have you ever heard of one?

The WITNESS: I have never heard of one, no, not to my knowledge.

Mr. HITT: For mail pay cases or otherwise?

The WITNESS: No.

By Mr. Rood:

Q178. You say you have never heard of any such study  
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being made before?

A. In a mail pay-case, he says.

Mr. HITT: Or any other kind of case.

The WITNESS: Oh, yes, in a number of cases both the Commission and the carriers have gone to considerable detail in figuring their added or out-of-pocket cost, or what they would save if they did not transport the traffic in question.

By Mr. HITT:

Q179. Have you ever had one of these cases, one of this particular kind that would be identical with this?

A. I consider an abandonment case more or less analogous to this.

Q180. This kind of step, working it out in the manner you have done here, that has been done in abandonment cases?

A. In principle yes.

192 Q181. You think it is analogous to abandonment cases?

A. I think the issues are analogous, yes.

Q182. Do you know of any other cases in which such a study has been used?

A. I have a case in my mind of the Illinois Central, where they sought a decrease in rates involving the transportation of black strap molasses, I believe it was, and they made the effort to arrive at what would be the actual out-of-pocket expenses of handling that traffic.

Q183. Is this a standard form of study by the Interstate Commerce Commission? Have they used it themselves, made a study and put it in in a case of this character, worked out in this manner on general averages?

A. You mean involving mail pay case?

Q184. Any case.

A. It would depend upon the nature of the case. Of course, all the carriers confine themselves to a statistical factor in statistical apportionments.

Q185. I mean basing it on the hypothesis of a Senate Document, No. so and so, and carrying it forward like this, and dividing it up?

A. Yes, I would say in principle that method is used in a great many cases. It depends on the individual issue at stake, but in principle it is followed.

Q186. I am talking about using a study substantially identical with this in other cases. In other words, haven't you made novel departures here, different from what has ever been done?

193 A. No, I don't think so. The substance of this study here is similar to a great many cases. We have used car mile as the basis for separating these expenses, and that is used in a great many of the Commission's cases. For certain expenses we have used the out-of-pocket portion of the expenses, which the Commission has done and the railroads themselves have done. We have attempted to show the savings

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in the various expenses, which the Commission also does and also the railroads.

But I might, say, Mr. Hitt, you would have to have another mail pay case to tie it up identically with the factors involved here.

Q187. And that never has been done?

A. To my knowledge; at least, I have not, no. I have not worked on any case involving the added expense of carrying the mail.

Q188. If there had been such a case you would have known about it, wouldn't you?

A. Not necessarily. It might have been done years ago. I would know about it if it had been done in the last four or five years.

Cross Examination by Mr. HIRT:

Q225. Now, maybe I can help to clear that up, Mr. Binet. Is what you are attempting to bring out the fact that the Commission made a change in those rules for freight and passenger expenses after some year in this period, that they had the result of throwing all expenses of the Georgia & Florida for passenger operation into freight expenses?

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A. I don't know whether it did in 1937 or not, but it had the effect of throwing some of them in.

Q226. Wasn't your point in showing some passenger revenue that they had some profit?

A. That is right.

Q227. Whereas under your separation of the expenses they had to throw the passenger expenses into freight, and there probably was not a profit?

A. Yes, I think that was the explanation of that showing there.

Q228. You are quite correct, sir.

A. I don't want to show that they made a profit merely because it showed it there. I think it was an accounting problem.

Q229. Yes. In other words, the Interstate Commerce Commission in formulating its accounting regulations, they have to view the country as a whole, in the matter of Class

I railroads they used the Class I as a whole, and have  
195 to make the most practicable arrangement that will be generally comparable for a wide territory; isn't that right?

A. I would not want to say what was in their minds when they evolved it.

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Q230. You know they do that. Certain accounting regulations apply to Class I railroads, and certain others apply to others..

A. Oh, yes, they have the different regulations for Class I and Class II roads.

Q231. You would know if all the carriers in Class I, regardless of diversity in Class I, if they all reported on this average or uniform instructions, if they were not reported to show the average they would be all merged in with the average.

A. I take it you mean if the Commission's rules for the account to be kept by carriers, if these rules did not apply to a certain road and did apply to certain others?

Q232. Applied to Class I roads as a whole, but it produced distorted results as to one?

A. They all had to report on the same basis.

Q233. Yes.

A. That is correct.

The COMMISSIONER: How is the Georgia & Florida classed?

The WITNESS: Class I railroad.

By Mr. HITT:

Q234. Do you know why that is so?

A. I believe it is because its operating revenue exceeds over \$1,000,000.

196 Q235. Class I roads include lines making over one million,

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and does not include lines making under a million. The result of these statistics is that all Class I roads are considered together so that you hit an average, isn't it?

A. What statistics?

Q236. Statistics of the Interstate Commerce Commission that you have been reading from, or the studies you read from Senate Document No. 63. That is for the general average for Class I roads as a whole.

A. Yes, the out-of-pocket percentages we took are based on territory-wide studies. However, we have applied those averages to the specific expenses of the Georgia & Florida Railroad, but as far as this study here is concerned, I read you the figures of the Georgia & Florida itself.

Q237. I know that. These figures you have made your study on are based on averages produced for lines as a whole for the whole territory?

A. The out-of-pocket percentages.

Q238. Yes, upon which your study is based.

A. They are based upon the Commission's studies of the operation of the Operating Expenses of traffic over an extended period for a large number of carriers.

Q239. For Class I roads?

A. Well, I assume they are Class I roads.

Q240. Do you have any idea what the average earnings per mile of Class I roads is as a whole?

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A. Offhand I couldn't say.

Q241. Would you say it was not less than twenty thousand a mile?

A. I would not have any idea without checking it up.

Q242. Would you say, as an analyst, that averages produced on a line of a thousand miles would be comparable



With figures produced on a line of a hundred miles, with earnings of only three thousand a mile?

A. What kind of earnings?

Q243. Average earnings and average mileages. Would you say any operating statistics or financial results or operating expenses or average earnings would be comparable?

A. They might or might not be. I couldn't answer that.

Q244. You would have to show the comparability?

A. You would have to analyze all the figures to determine whether a road of light density would have the same figures as the road of heavier density.

Q245. That we have not done here?

A. No, sir.

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Q249. When you gave the figures of number of passengers handled in several years, you did not make any account at all or take into consideration, or make any allowance one way or another as to how far one passenger traveled, or gave no indication of the footage so occupied?

A. You mean the distance carried? No, sir. We merely place in there the number of passengers carried and the passenger mile.

198 Q250. So far as you know, you have nothing to show whether they could operate with one car or two cars? You just assumed possibly they could operate with two cars whether mail was in there or not?

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A. Will you say that again?

Q251. You assumed they would have to operate two cars even though the mail was discontinued, but in your calculation you assumed they could do away with one car?

A. That was the extreme that we would say. My belief is that they would have to continue to operate two cars, as I said, but the maximum would be one car would be taken for use of the RPO car.

Q252. Your calculation was based on one car?

A. On each one of the trains.

Q253. And you thought possibly they could do away with one car, but whether it was so or not you had nothing to go on except the assumptions you made?

A. I didn't say they could do away with one car or any car, but assuming they could do away with one car that would be the effect.

Q254. In your opinion, if they couldn't do away with one car, your opinion is not based on the observation of the traffic itself, but it is based on what?

A. It is in a sense. I think there were some figures in the cars that showed during the year 1931 there was an average of 25 or 30 passengers per car on Trains 4 and 5.

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Q258. When you use the expression, "we did this", or "we did that", you are using that in the editorial sense?

A. I would not say exactly an editorial sense. In the preparation of all this data I have had to confer with other members in the Section on various little points. We talked this matter over, and that is why I used the word "we".

Q259. Did you mean to be speaking for them as well as yourself?

A. I have had the benefit of the views of other people. I have not always adopted them, but we have discussed these matters.

Q260. In other words, it is your opinion after you talked it over with other members?

A. That is correct.

Q261. I take it that you have not discussed it with everybody in the Interstate Commerce Commission?

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A. Oh, no, sir.

Mr. HITT: Mr. Commissioner, I believe that will conclude my examination, and I would like again to move for the exclusion of the whole line of testimony. He has testified in order to have a proper comparison, he would have to analyze it and show the proper comparability of the comparisons made.

The COMMISSIONER: Motion overruled.

Mr. HITT: Exception, please.

200

Parr—Direct

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GILBERT J. PARR, a witness produced on behalf of the defendant, having been first duly sworn by said commissioner, was examined, and in answer to interrogatories, testified as follows:

Direct Examination by Mr. ROOD:

Q1. Mr. Parr, you may proceed.

A. My name is Gilbert J. Parr, Chief of the Cost Section of the Bureau of Transport Economics and Statistics, Interstate Commerce Commission, with headquarters in Washington, D. C.

I have been Chief of the Cost Section for a period of six and a half years. Prior to that time I was for a period of 19 years connected with the Missouri Pacific Railroad at Houston, Texas, and various other of the division headquarters of the Missouri Pacific in Texas.

I was employed in the division office, in the Operating Offices all during that time. For the past ten years with the Missouri Pacific I was a special operating accountant and devoted my entire time to making cost studies, both out-of-pocket studies and full cost studies of the operations, and analyzed the carrier's operations, made analyses of the carrier's operations.

My duties with the Cost Section consists in aiding in the devising of the cost formulæ and the analyzing of cost (Page 351)

data submitted by the various parties; that is, motor carrier, railway carriers, and water carriers, and to make reports to the Commission and to aid the Examiners in writing reports for inclusion in the Commission's report.

Q2. What is the relation between you and Doctor Edwards down there?

A. Well, I am assistant to Dr. Edwards. He is Head Cost Analyst, and while my title is Chief of the Cost Section, I would be assistant Cost Analyst.

Q3. Will you state again the name of the section you are in?

A. Cost Section of the Bureau of Transport Economics and Statistics.

Q4. How long has there been a Cost Section?

A. I transferred or came to the Commission for the purpose of heading up the Cost Section.

Q5. That was a new section?

202 A. Yes. The section was in existence possibly six months or a year before that time with a limited staff, possibly one or two men in the staff at that time. When I came with the Commission in 1939, July, 1939, it was one of my first duties to interview people and to form a staff.

Q6. Has the technique and science of cost accounting in the Interstate Commerce Commission improved, developed, or become more accurate since 1928 up to now?

A. Oh, yes, sir. We are learning about costs every day. In other words, we feel that it is hard and we are learning something about costs as we go along.

For example, in the Class Rate Investigation, of which Senate Document No. 63 is a synopsis or contains a synopsis of all the studies in that case, we originally prepared the cost by taking the entire expenses and breaking it down

between the various services, and to various classes of traffic, box car traffic, and so on.

By taking the entire expenses, and then before that bearing was concluded we found that due to distortions in the costs, not in the relative territorial costs, but due to the distortion of the cost for different sized loads in a car, in apportioning the entire expenses, without making any separation between the direct and out-of-pocket expenses, and the constant expenses, resulted in a distortion of cost for particular loads. We therefore introduced, or made extensive studies in connection with the out-of-pocket portion of the cost in order to determine just what the actual cost of handling the traffic would be.

203. On the constant cost or remaining expenses, we felt that it was not in the province of a cost man to apportion those to any particular traffic, so as I say, we made that separation and we showed the out-of-pocket cost separately from the constant cost.

In that Class Rate study, which is reproduced in Senate Document 63, we did show the fully distributed cost; in other words, Distributed the constant cost on a mathematical prorata basis on tons and ton mile. That merely indicates the trend of cost finding in recent years. In other words, we are always willing to learn about cost, and we are always learning a means of apportioning costs.

Q7. Would you say the cost formulae today are much better than the cost formulae used by the Commission in 1928 or in 1931?

A. Well, in 1928 and 1931 the Commission did not have really any cost formulae. They still haven't got any cost formulae, but the Cost Section was formulated for the express purpose of determining cost formulae for that they might be used by the Commission in gathering costs and might be distributed to the carriers so they would have means and procedures for gathering those costs.

For instance, we have developed for railway Form B just a little more refined cost formula, which was used in developing out-of-pocket and full cost in the automobile case. The principal difference between railway Form A and railway Form B, we develop the cost for particular Trains and got at the cost of the steady traffic by taking the apportionment of the steady traffic and the ton miles for the car, ton miles of the particular train, whereas the

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railway Form A which was used in the development of the territorial cost, we used particular averages and developed costs for various groups of expenses, such as car expense, and running expenses, and so on.

We have also developed other cost formulae, railway Form U which is still more refined. It follows the same general procedure as railway Form B, but there is a separation made between the through train and way train in that formula.

We have also developed terminal cost formulae for the development of switching costs. We have developed motor carrier formulae, which we are applying to motor carriers throughout the United States; and a barge formula, and we will in the near future develop a steamship formula.

That is one of our duties in the Cost Section.

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Q11. You are generally familiar with the method by which the carrier states its claim in these exhibits and apportionments its costs?

A. Yes, sir.

Q12. And you are familiar with Mr. Binet's method?

A. Yes, sir.

Q13. Will you tell us what is the best method of determining costs in this case?

Mr. HITT: I object.

The COMMISSIONER: You might ask him what his opinion is as to the best method, as a cost accountant, of determining costs, but I think you are going to find in this case that—all right, go ahead.

The WITNESS: Well, I think Mr. Binet's approach to the subject, that is, the development of the expenses that  
205 are incurred or would be incurred in the handling of this traffic, or conversely, the expenses that would be saved if the traffic were not handled, I think that is the more logical approach to ascertaining the actual cost of this traffic. I think a statistical apportionment such as the one used by the carriers in the ascertainment of these costs contain fundamental weakness, the fundamental weakness that the only true cost, the only cost you can really put your finger on or measure, is the out-of-pocket cost; that the other cost, the constant cost, the difference between the out-of-pocket and the total cost, is not susceptible to statistical apportionment.

It is true cost accountants have in the past apportioned those on the basis of out-of-pocket costs, but the fallacy of that is that it apportions a relative large per cent of constant expenses to the traffic which is expensive to handle, and a relatively small portion of expenses to the traffic which is inexpensive to handle, so we cost people feel and believe that the function of the cost man is to develop the out-of-pocket cost, and then to show the constant cost expressed as a lump sum.



However, we go a little further in that, in that we distribute the constant cost for ready references, so that they can see if that particular traffic is making a greater or less contribution to the constant cost than the system traffic.

In other words, we distribute it on the basis of ton and ton mile. We distribute the line mile cost on the basis of ton mile, and the constant portion of the terminal expenses on the terminal basis. We did that with a recognition that constant costs cannot be apportioned on that basis.

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The WITNESS: I would like to make one further statement.

Mr. ROOD: By all means.

The WITNESS: As I listened to the evidence this morning I was rather impressed with the idea that we were trying to spring something new, Mr. Rood was trying to spring something new when he spoke of the out-of-pocket cost, but the fact of the matter, as Exhibit No. 22 will show, out-of-pocket cost has been known for a number of years. The economists in the past have pointed out there are such things as out-of-pocket cost, and a great many of the railroads have used out-of-pocket cost in showing a cost to the Commission. I have in mind the Black Strap Molasses Case, wherein the Illinois Central have shown their added cost of handling the black strap molasses, and also in the Transcontinental Sugar Case, the Southern Pacific has shown their out-of-pocket cost. In fact, the statistician for the Southern Pacific Line, Mr. Day, was one of the foremost exponents of out-of-pocket cost and put in a number of out-of-pocket studies. In all abandonment cases the carriers show out-of-pocket costs, so it is not anything new.

We don't claim to corner the market when we show out-of-pocket; it has been going on for years. No attempt has been made to develop the costs separately from the full costs. In fact, up until six or seven years ago most of the cost studies were on the basis of full costs. By that I mean such a study as the carriers here have submitted, taking their total expense and breaking it down into various segments of their line, or to various segments of the traffic. So it is not anything novel; out-of-pocket costs are not novel.

207 The COMMISSIONER: I think you have made that clear.

By Mr. ROOD:

Q16. By "out-of-pocket costs," is that term synonymous with added costs?

A. Yes, sir; or direct cost, or added cost.

Q18. The Georgia & Florida Railroad, and I am quoting from line 9 of Defendant's Exhibit No. 12, which shows traffic producing revenue of \$250,000, with direct or added or out-of-pocket cost of \$63,000, making a net contribution to the railroad treasury from carrying the mail of \$186,000 of revenue, equal to 396 per cent of the direct cost.

I ask you, in your opinion, was that traffic under those circumstances making a fair contribution to constant costs?

A. I would say in my opinion they undoubtedly would make a substantial contribution to the constant cost. Of course, any contribution—any cost or any margin or excess over the out-of-pocket cost is a contribution; five cents over the out-of-pocket cost would be a measurement of contribution that a traffic makes to the constant cost.

Q19. Well, this exhibit shows that the contribution was \$186,000, does it not?

A. Yes, sir.

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Testimony of J. D. HARDY:

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Direct Examination by Mr. STERN:

Q1. Mr. Hardy, prior to your occupying your present position, what positions did you have with the Post Office Department?

A. For approximately five years immediately preceding my appointment as General Superintendent, on May 1, 1939, I was Division Superintendent of the Railway Mail Service at New York, and for 17 years prior to my appointment as Division Superintendent at New York I was chief clerk of the Railway Mail Service at Harrisburg, Pennsylvania.

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Q3. Do you have to make any decisions wherein you have to evaluate the value of the services?

A. Yes, sir.

Q4. What studies have you made to prepare yourself to make such evaluations?

A. In evaluating the various classes of service, we take into consideration a number of factors, one, the necessity for the service, whether there is any present adequate service, the advantages to the public of the RPO service as compared with the closed spot service or Star Route service, whether the service is fully justified, whether it justifies the cost on the basis of the L.C.C. rates, the willingness of the carrier to carry the traffic, and whether there is any

available substitute service by other railroads or contract service, which would provide the necessary service to the public.

209 Q5. Do you take into consideration the quantity of  
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mail to be shipped?

A. Yes, sir; the value of the mail, as well as the class of the mail. For instance, there might be a considerable quantity of parcel post mail, but a limited amount of first class mail. We consider that feature, as to whether there is a sufficient quantity of first class mail to warrant the establishment of the service.

Q6. How about such questions as the quality of the service, for example, schedules of trains, or speed of the trains? Do you take that into consideration?

A. Yes, sir. We determine whether the carrier operates a passenger train, mixed train, and more particularly whether the schedules of those trains are such as to provide adequate service.

The public desires an early receipt of mail from their base offices, and they like as reasonably late closing of the mail as possible, so that the businessman can get his mail out during the day and get it to destination every night. If the schedule is such as to provide for that service it is a determining factor in the establishment, or the continuance, of the service.

Q7. Did you have any method of checking what the amount of the service you require was on the Augusta & Madisonville?

A. Yes, sir; the chief clerk in charge of that line is required to make periodical inspections of the service  
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210 on a Class A line, and he is required to make a complete inspection of every train every two years. Those inspections determine the quantity of mail carried, the various classes of mail carried, and it records the time clerk's report for duty, and the en route time over the road, and the amount of mail distributed en route, as well as the storage mails carried.

Q8. Have you those inspection reports for the period between 1930 and 1938?

A. Yes, sir; I have the inspection reports for Trains 4 and 5 made. Train 4 was inspected on April 7, 1932. Train 5 was inspected on April 8, 1932. Train 4 was again inspected on June 7, 1934, and Train 5 on June 8, 1934. Train 4 was again inspected on March 15, 1935, Train 5 on March 14, 1935. Train 4 was inspected on April 8, 1937 and Train 5 on April 7, 1937.

Q9. And you have the inspection reports of those dates that you mention?

Mr. STERN: I offer them in evidence.

Mr. HITT: No objection.

The COMMISSIONER: They will be marked Defendant's Exhibit No. 23 and will be accepted as one exhibit.

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Q18. Mr. Hardy, taking all the factors you have mentioned into consideration, what, in your opinion, was the value of 15-foot compartment service on this line between the years 1931 and February, 1938?

211 Mr. HITT: Wait a second. The value from what point of view?

Mr. STERN: The reasonable value of the service. That is all I need to ask, I think.

The COMMISSIONER: He has testified that he has valued it or evaluated it, I forget which, using a lot of factors, and while he was going that,—I had forgotten for what purpose he was evaluating it.

If it is for how much the Government might have been willing to pay, or whether the Government might have been willing to engage the service on the basis of the rates already fixed for that class of railroad.

Mr. STERN: I am not asking him whether the Government was willing to pay it, but if they wanted that kind of service, what is its value. It is what a willing buyer or a willing seller of that kind of service agree upon. That is the proper test. Now, this witness says he took into consideration all of the factors that might go into making up supply and demand.

For instance, he stated the willingness of the carrier to carry. He took into the consideration the fact there was a

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ceiling made by the I.C.C. rates.

He took into account that the user of such service might use alternative methods. He is an expert in the field, and he wants to give some opinion generally.

212 The COMMISSIONER: I have some question as to whether or not he has qualified himself as an expert on the fixing of the value of such service, and I don't know as there is any such thing as an expert on that. He can't testify an instance where he has done that, I don't think. Have you ever valued the service of the kind described in terms of money, other than for the purpose of determining whether or not you would establish or discontinue a mail service?

The WITNESS: That is, to establish the rate?

The COMMISSIONER: Yes, have you ever valued it for the purpose of establishing a rate which you would pay?

The WITNESS: No, sir.

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Q25. When you made a decision concerning continuance of this service in 1938 or 1939, at that time were you familiar with the prior history from 1930 up to the period upon which you were acting?

A. Only as indicated in the recommendation of the field officials, which is a part of the record submitted.

Q26. Well, at that time did you have these inspection reports before you?

A. I had the inspection report for 1938.

Q27. And that is the one you testified treated of the same number of units as the prior years?

A. Yes.

Q28. Now, I come back to the question which was objected to and the objection overruled.

Will you state what, in your opinion, was the value of services in a 15-foot car, the reasonable value?

A. On this line?

Q29. On this line.

213 A. Well, the fact that this service was being performed on a mixed train, that is, freight train and passenger train, on a freight train schedule, the only proper appraisal I could make of the value of that service would be that it was not worth what we are paying for the service as compared with a 15-foot mail compartment in a passenger train operating on a satisfactory schedule and on a faster schedule.

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Q33. You have that list, Defendant's Exhibit No. 2. Now, in evaluating the service, did you take into consideration such other points along the route, the value of the service to other points along the route, as are not contained in Defendant's Exhibit No. 2 when you reached an opinion in 1939 as to the question of discontinuing this road? Did you have before you any different situation which existed at that time than had existed between 1931 and 1938?

A. The records of the inspection reports and the recommendations submitted by the field officials indicated that conditions had been practically the same on that line prior to the time of the recommendation for the curtailment of the service.



Q34. I show you a paper containing writing in pencil,  
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and underneath that a document dated July 5, 1939, containing your stamped signature.

I just want to ask you what those particular papers were. What is at the top of the paper?

214 A. This is a memorandum prepared by my assistant for my information and consideration in connection with the recommendation from the field for the proposed curtailment of the service.

Mr. HITT: Is that for 1935?

Mr. STERN: No, I am detaching that. It is 1939. I ask that that be marked for identification.

(Said paper was thereupon marked for identification "Defendant's Exhibit No. 24".)

Mr. STERN: (Handing paper to Reporter): I ask that the other paper be marked Defendant's Exhibit No. 25 for identification.

(Said paper was thereupon marked for identification "Defendant's Exhibit No. 25".)

By Mr. STERN:

Q35. Mr. Hardy, will you state generally what Defendant's Exhibit No. 25 is?

A. This was a letter which I dictated to the superintendent of the Railway Mail Service at Atlanta, Georgia, to the effect that we had given careful consideration—

Q36. (Interposing) It is your decision on the matter?  
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A. It is my decision to make no change in the authorized space in the Valdosta & Madisonville RPO, and my reasons for that decision.

Mr. STERN: I offer Defendant's Exhibits No. 24 and 25 in evidence.

Mr. HITT: No objection, except the general objection that it relates to a later period.

215 Mr. STERN: Well, your Honor, it is based on the same data.

The COMMISSIONER: I overrule it.

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Cross Examination by Mr. HITT:

Q41. Did I understand your testimony on Friday to the effect that various factors determine whether or not you should use railway post office cars, and primarily and above everything was a convenience to the public?

A. Yes, sir.

Q42. To give the public service?

A. Where the service was commensurate to the expense the service to the public was the primary consideration.

Q43. I don't understand you said anything about weighing it against the cost of the service. I think you mentioned cost of the service was a factor, but primarily I thought you said it was the public convenience and necessity which controlled.

A. Well, I would still maintain that.

Q44. Is it your position that in general substantially the same conditions prevailed in the years of the period of the claim as in this 1938-1939 period when you were on the job?

A. Yes, sir.

Q45. And you understood that to be the testimony of Mr. Stephenson. Did you hear his testimony?

A. Not all of it; no, sir.

216 Q46. I believe you said that was your contention, didn't you, the conditions under which the mail was transported, and so forth, were substantially similar?

Mr. STREX: Yes, they were. The inspection report shows that.

By Mr. HITT:

Q47. About this contract with the railroads to pay higher rates of pay. You spoke something about your

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authority, and I think mentioned five or six instances in which that was done. Did it ever come to your notice that the claimant here did approach the Post Office Department during this period and ask what the Department's policy was with respect to a special contract?

A. You mean verbally?

Q48. Yes.

Mr. STREX: Well, I think the witness' attention ought to be called to the matter of whom was approached.

The COMMISSIONER: If he can recall, all right; if he doesn't recall he may say so.

By Mr. HITT:

Q49. Do you know?

A. I do not. I have no recollection or record that any approach was made to the Department.

Q50. If a representative of the Department said to the carrier that it was against the policy of the Department to make a special contract with lines like the Georgia & Florida, but that that was confined to various special circumstances, like narrow gauge roads, or Rocky





247 Mountain roads, or the Hudson & Manhattan Railroad up in New York, and a few instances of that sort, and it was not customary to make them otherwise, would you say in your opinion that was a correct statement of the Government's policy?

A. I would not say that was a correct statement, sir.

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because upon a formal request of the department for a special contract, as provided for in the law, the Department makes a very thorough field investigation to ascertain whether they would be justified in recommending to the Second Assistant Post Master General, and reporting annually to Congress as they are required on all special contracts, such a special contract.

Now, we had within the last 60 days a case where the railroad companies had prepared a brief setting forth the physical condition, operating conditions, and revenues of their road, and requested the Department to give consideration to negotiating a special contract. The brief was referred to our field officials. They made a very thorough investigation. They ascertained the terrain over which that railroad operated, the condition of the roads, whether we could substitute Star Route or other classes of service to the public, and upon the conclusion of that investigation it was the opinion of the Railway Mail Service, the railway adjustment, that a special contract should be negotiated with that railroad, and such action was taken.

Q51. Have you any instances where such action was taken in the case of lines that are not specifically circumstanced, such as the Rocky Mountain roads, and such as the  
218 Hudson & Manhattan roads, railroads like the Georgia & Florida that are not traversed by other lines crossing it, and so forth?

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A. Well, the Louisiana & Arkansas Railroad, while it probably traversed a more rugged terrain, it was comparable to this railroad in mileage, and I think in mail revenue.

Q52. Is this something that just recently has been done?

A. It was negotiated within the last 60 days.

Q53. Prior to that time did you have any instances of that character?

A. Not recently; no, sir.

Q54. You spoke of your conversations with the various mail traffic managers of the big systems. They were all representatives of the big systems where they handle mail in large volumes, or full postal cars, trainloads, and such as that, don't they?



A. Generally speaking, yes.

Q55. Where it is handled in several cars in a train, and where you have a storage car heavily loaded that makes a pretty fair revenue for the carriers, does it not?

A. They seem to think so. They want it bad enough.

Q56. It is the volume which makes it attractive. They wouldn't be looking for chicken feed. They are looking for volume to make it profitable?

A. Well, every railroad that is obliged to operate head-in equipment feels that the mail revenue is very helpful in

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219 taking care of the head-in traffic. Head-in traffic, sir, is mail and express and baggage which they carry in connection with their passenger business and as long as they are obliged to operate passenger trains, carry passengers and baggage and express, they invariably feel that the mail revenue is a very profitable adjunct to their regular traffic, because it is paid on an annual basis. It does not fluctuate. They don't carry an extra coach load of passengers one day and a vacant space the next, but this is constant revenue year in and year out which, in my experience, over a good many years of service, the railroad companies consider as very desirable revenue.

Q57. Is that true of big and little lines?

A. All lines, regardless of volume or size.

Q58. In other words, where the traffic requirement requires them to operate an express car and baggage car it is desirable also to handle mail?

A. Yes, sir.

Q59. Whatever the rate may be?

A. Yes, sir.

Q60. That is your understanding of their attitude?

A. Yes, sir.

Mr. Hirt: I believe that is all.

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*Respecting Plaintiffs' Exhibits Presented at a Hearing  
Held by Agreement of Counsel on June 18, 1946, for  
the Sole Purpose of Receiving in Evidence of  
Certain Exhibits.*

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COLLOQUY

Mr. Roop: I do not object to the introduction of this. My failure to object should not be construed as an endorsement of the title which appears on it.

The COMMISSIONER: Admitted.

Mr. HITT: I now have Exhibit No. 19, being pictures and graphs of the 15-foot railway post office compartment car space in the combination and mixed cars.

The COMMISSIONER: Admitted.

Mr. HITT: I thought, Mr. Commissioner, that this would probably help you visualize the situation as to what was in one of these railway post office cars.

The diagram shows the setup of the space, and the equipment in there, which is supplied by the railroad, according to the specifications of the Post Office Department, and contains racks, and so on, for the sorting of the mail.

The COMMISSIONER: Is this specifically what was done, or is this an example?

Mr. HITT: This is a picture of one of the very cars.

The COMMISSIONER: It is a picture of one of the cars?

Mr. HITT: Yes, sir.

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Mr. ROOD: On your Railroad?

Mr. HITT: On the Georgia & Florida Railroad.

The COMMISSIONER: Admitted.

Mr. HITT: Then we have, as Plaintiffs' Exhibit 20, what is headed "Approved and Standard Methods for Ap-  
222 portionment of Unused Space in Combination and Mixed Cars". This I furnished you before in the form of a printer's proof.

The COMMISSIONER: Approved by the Interstate Commerce Commission?

Mr. HITT: Yes, sir.

Mr. ROOD: This is argumentative. This is just an excerpt from the 56 I.C.C. Order, and we would much prefer to have the Commissioner read those in, too.

This is not approved; it is not standard; in fact, it was specifically rejected by the carrier.

The COMMISSIONER: Are these volumes of the I.C.C. Reports?

Mr. HITT: Yes, sir, the citations are there; and furthermore, I purpose to offer a set of these I.C.C. Reports in full, which contain this same information, but this is Plan II drawn out of one of the Commission's decisions, and shows a description of it.

Mr. ROOD: There is Plan I and Plan II, and Plan III, and the Commissioner can make up his own plan.

Mr. HITT: This is all Interstate Commerce Commission's quotations except for the paragraph explaining what it is.

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Mr. ROOB: You have introduced this as an appendix to your requested findings, already, have you not?

Mr. HITT: I have referred to it, yes, sir. What I had intended to do was, to attach it for the information of the Commission.

Mr. ROOB: I do not object to its being attached to 223 his requested findings.

The COMMISSIONER: The objection to Plaintiffs' Exhibit No. 20 as evidence is sustained.

Mr. ROOB: I will consent to its being attached—not to his requested findings, of course.

Mr. HITT: Even if the objection is sustained it still remains in the record?

The COMMISSIONER: Yes, sir.

Mr. HITT: Here is Plaintiffs' Exhibit No. 21, a diagram entitled "Demonstration of the Inside 30-foot Compartment inside Fallacy".

In one of the Commission's decisions they refer to the location of the partition as having given the mail service a larger proportion of the unused space than they should have, and

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that is a misapprehension, and we thought this graph would show that very clearly.

Mr. ROOB: I object on the ground that it does not state the facts. It is a complicated argument, based upon the evidence. We do not concede there is any fallacy. I do not object to it being attached to the findings.

The COMMISSIONER: Objection sustained.

(Said diagram was marked for identification as Plaintiffs' Exhibit No. 21.)

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Mr. HITT: We offer, as Plaintiffs' Exhibit No. 24, 224 a statement entitled "Total Operating Revenues, Mail Revenues, and Net Railway Operating Income per Mile of Road, Georgia & Florida R.R. compared with all Class I and Class II Railways in the United States," for the calendar years 1931 to 1938, inclusive.

Mr. ROOB: Off the record.

(Here followed discussion off the record.)

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Mr. HITT: Mr. Commissioner, I offer, as Plaintiffs' Exhibit 26, a statement entitled "Extracts concerning special contracts with railroads", from hearings on Post Office Department appropriation bill for 1946-1947, in which the representatives of the Post Office Department stated the number of special contracts which they have with certain railroads, and the amounts paid, and the comparison of the amounts with what the I.C.C. prescribed rates would be.

The main point of this exhibit is to indicate the Post Office Department does not freely enter into special contracts, but it is their policy not to enter into them, except in very special cases, with roads in the Rocky Mountain region in particular.

I believe the Witness Hardy made reference to the recent

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contract with the Louisiana and Arkansas Railroad. The Post Office Department advises me that it is the Missouri & Arkansas Railroad, they told me that they made the contract with them because they were in the Ozarks, 225 where conditions were similar to those in the Rocky Mountain region.

Mr. ROOB: If you want to get more evidence with regard to special contracts, I have no objection to your recalling Mr. Hardy to the stand.

The COMMISSIONER: He is offering this by way of a statement made to Congress, and I presume it is an admission of some kind.

Moreover, I am not going to open up the evidence for any more testimony.

Mr. HITT: Off the record.

(Here followed discussion off the record.)

The COMMISSIONER: The exhibit will be received an excerpts from the hearings, and the contents of it will be given only such effect as will be determined or that may be given to the original document itself.

As I see it, the offered exhibit adds nothing to the original document, which the court might consult without it being offered.

(Said "extracts concerning special contracts with railroads" was marked "Plaintiffs' Exhibit No. 26", and made a part of this record.)

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*Plaintiffs' Exhibit No. 3*

COPY

Witness: Todd

BEFORE THE  
INTERSTATE COMMERCE COMMISSION

Docket No. 9200

In the Matter of the Petition of the GEORGIA & FLORIDA RAILROAD, and W. V. GRIFFIN and H. W. PURVIS, its Receivers, for a Re-Examination of Rates for the Transportation of the United States Mail.

ANSWER OF THE POSTMASTER GENERAL TO PETITION FOR  
REOPENING, REHEARING AND RECONSIDERATION

VINCENT M. MILES,  
*Solicitor of the Post Office Department.*

WILLIAM C. O'BRIEN,  
*Attorney, Post Office Department.*  
FOR THE POSTMASTER GENERAL.

February 11, 1944.

227

BEFORE THE  
INTERSTATE COMMERCE COMMISSION

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ANSWER OF THE POSTMASTER GENERAL TO PETITION FOR  
REOPENING, REHEARING AND RECONSIDERATION

Comes now the Postmaster General, defendant in the above entitled cause by his attorneys and for answer to the petition for reopening, rehearing and reconsideration, respectfully states:

- (1) Defendant denies the allegations of paragraph one of the petition but avers that the Commission in 192 I.C.C., 779-781, found that to meet the "total claim of the carrier for increased compensation."



"Would require an increase in compensation of 87.40 per cent" upon the basis of 1931 operations. Defendant admits that increased compensation was denied, but avers that just compensation to the carrier for the carriage by mail had already been fixed by the Commission effective August 1, 1928, 144 I.C.C. 675.

228 (II) Defendant denies the allegations of paragraph II of the petition as to the basis of the Commission's decision in 214 I.C.C. 66, and avers that the Commission gave consideration to many other facts and factors in arriving at said decision, as set forth therein and that the purported quotation therefrom in the petition is incomplete and misleading. Defendant admits that increased compensation was denied the carrier.

(III) Defendant admits the allegations of paragraph III of the petition but, upon the authority of *U. S. v. Griffin, et al., Receivers*, 303 U. S. 226, denies the legality of the order of the three-judge United States District Court, Augusta Division, Southern District of Georgia.

(IV) Defendant denies the allegations of paragraph IV of the petition but avers that the Supreme Court held (303 U. S. 226, 238) that:

"... a suit under the Urgent Deficiencies Act to set aside an order concerning mail pay is not primarily one against the Commission. Primarily, it is a suit against the United States and the United States can be sued only when authority so to do has been specifically conferred.

The Railway Mail Pay Act does not confer that authority.

Decree reversed—"

229 (V) Defendant neither admits nor denies the allegations contained in paragraphs V and VI of the petition as to petitioners suit in the Court of Claims but alleges that the so-called "Actual cost study," which petitioner asserts "has just now been completed for the entire nine months of the year 1931", and "to show the results for the twelve months of 1932 as a full year" does not constitute any proper evidence for consideration by this commission nor any proper basis for reconsideration of the numerous and repeated decisions of the Commission on the subject of just compensation for the petitioner. Such a so-called "actual cost study" was not made in accordance with the long established practices of

the Commission in Railway Mail Pay cases, which requires a joint study by both the petitioning carrier and the Post Office Department of the operations, space and costs of service during a mutually agreed upon period of service, by which procedure only can a reliable, and properly checked and adjusted set of figures and compilation of facts be secured to aid the Commission in its decision upon fair and reasonable rates.

Concerning cost studies the three-judge Georgia Court to which petitioner refers in paragraph III of petition said:

230

"Neither applicant nor this Court entertains the view that the hypothetical cost is necessarily conclusive. It is merely the *fairest method* that has been devised. If 'actual cost' as to each item be required applicants would be helpless and the Commission would be reduced to guessing."

Defendant, further answering paragraphs V and VI of the petition avers that petitioner has in prior proceedings repeatedly insisted upon the fairness and adequacy of the cost figures before the Commission and upon which it based its decisions and upon which the petition sued the Commission twice in the three-judge Georgia Court, and upon which it defended the Commission's suit in the Supreme Court and upon which petitioner instituted suit against the United States in the Court of Claims.

In their brief, p. 12 *et seq.*, before the Commission, Docket 9200, dated August 7, 1935, when the proceedings were reopened upon the Commission's own motion following the first decision of the three-judge Court, Counsel for petitioner argued at length the soundness for rate making purposes of the cost study which it is now proposed to supplant by the unchecked and uncheckable "actual cost study" upon which the instant petition is based. As to the original cost study petitioner's counsel said "All other mail cost ascertainment have been made on the same formulas. *No cost ascertainment could possibly be made which would be proof against the same criticism that they are not mathematically exact.*

231

"(that) there should be no real difficulty over the cost ascertainment in the particular instance on the Commission's own formulas for roads both larger and smaller than the Georgia & Florida . . ."

In the same brief (p. 12) counsel for petitioner argued that:

"The Commission has heretofore expressly said, in many previous decisions, that this very method of cost

ascertainment is a sufficiently reliable basis for conclusions as to the reasonableness of the rates of pay . . . .

(VI) Petitioner's compensation for carrying the mail has been considered by the Commission upon four separate occasions. The pertinent facts of the case have been carefully ascertained and submitted to the Commission; the regularly and properly made joint cost study has been considered by the Commission and accepted by it and by the Post Office Department and the carrier as sufficient for its purpose; there is now no ground for the submission to or the consideration by the Commission of any so-called "actual cost study" just now completed for 1931 and 1932, which was not made in accordance with the accepted, standard practice in this class of rate cases.

(VII) Wherefore, defendant, the Postmaster General, by his counsel, respectfully prays that the petition herein for reopening, rehearing and reconsideration and reargument be denied.

Respectfully submitted,

(Signed) VINCENT M. MILES

VINCENT M. MILES

*Solicitor of the Post Office Department*

(Signed) WILLIAM C. O'BRIEN

WILLIAM C. O'BRIEN

*Attorney for the Post Office Department  
Counsel for the Postmaster General.*

February 11, 1944.

*Certificate of Service*

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, Georgia & Florida Railroad, and W. V. Griffin and H. W. Purvis, Receivers, Augusta, Georgia, and Moultrie Hitt, 537 Woodward Building, Washington, D. C., and G. Kibby Munson, Transportation Building, Washington, D. C., attorneys for applicants, by mailing by first-class mail a copy thereof properly addressed to each party.

Dated at Washington, D. C., this 11th day of February, 1944.

(Signed) WILLIAM C. O'BRIEN

WILLIAM C. O'BRIEN

*Attorney for the Post Office Department.*



DESCRIPTION OF JUST WHAT IS A 15-FOOT POST OFFICE  
 88,192 (9% of the Total Pay Received by the Georgia & Florida is for handling 15-Ft. Post Offices)

POST OFFICE  
 11ing 15-Ft. Post Offices)

Plaintiffs Exhibit 19

STORAGE END

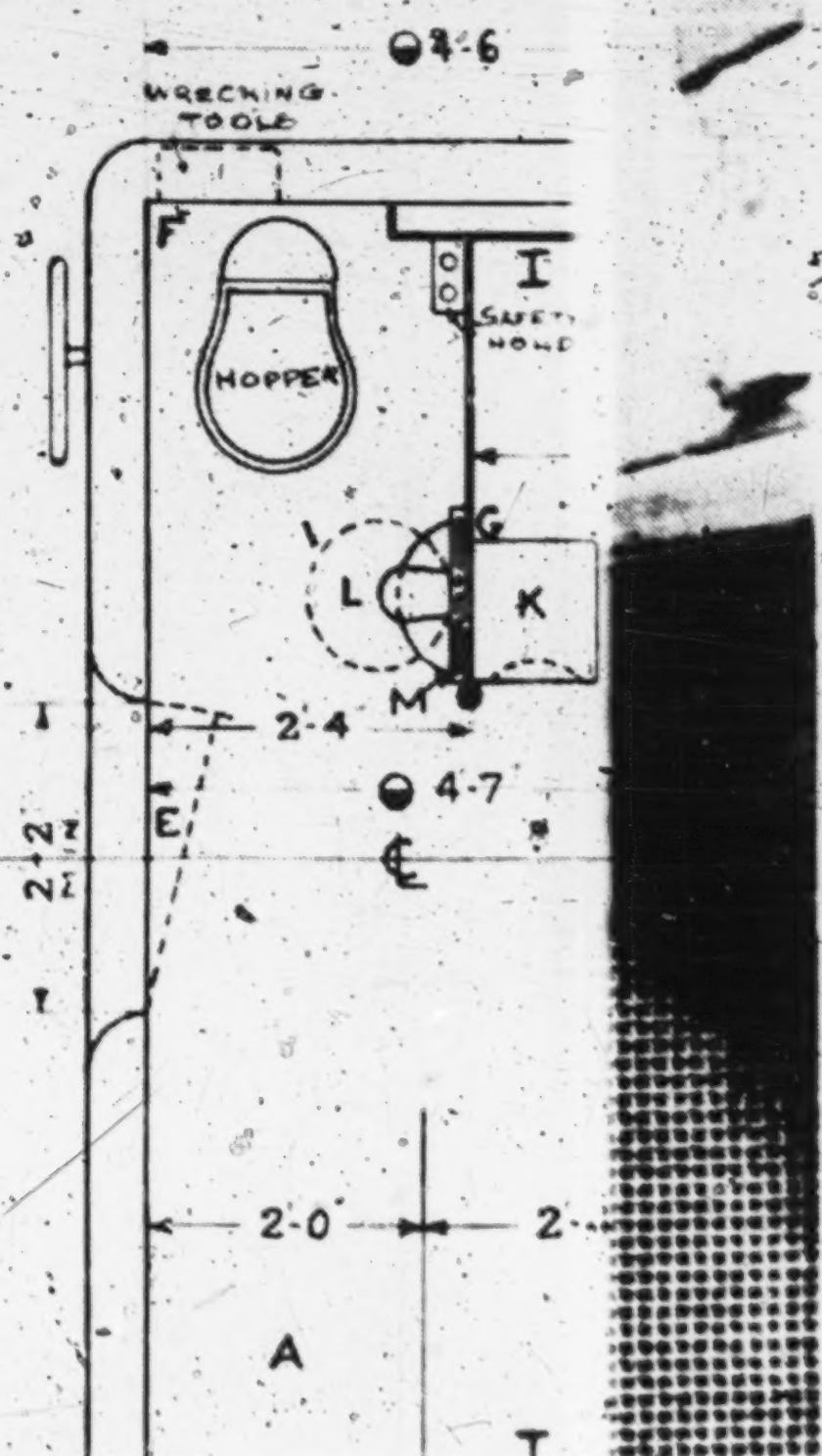
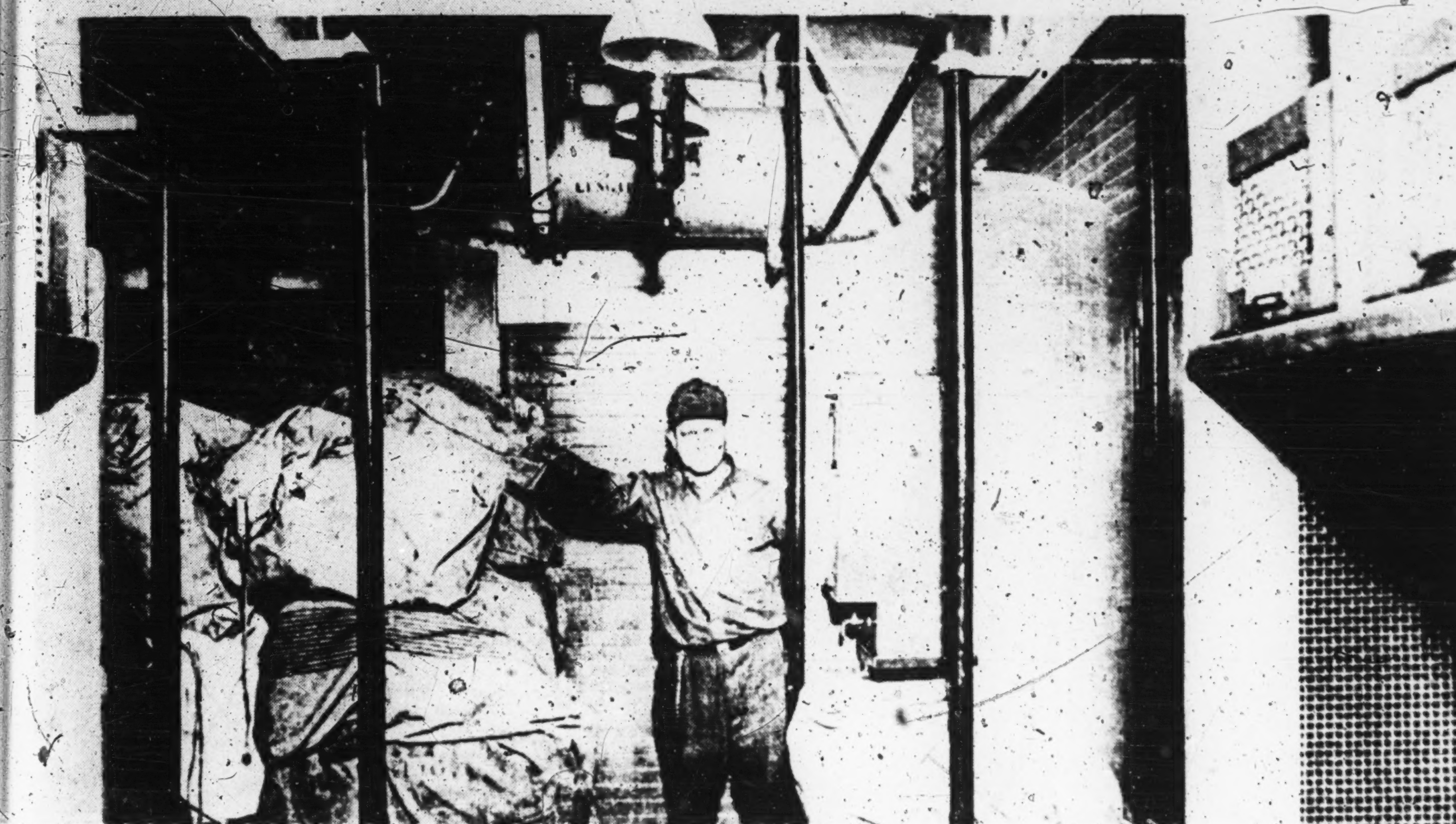
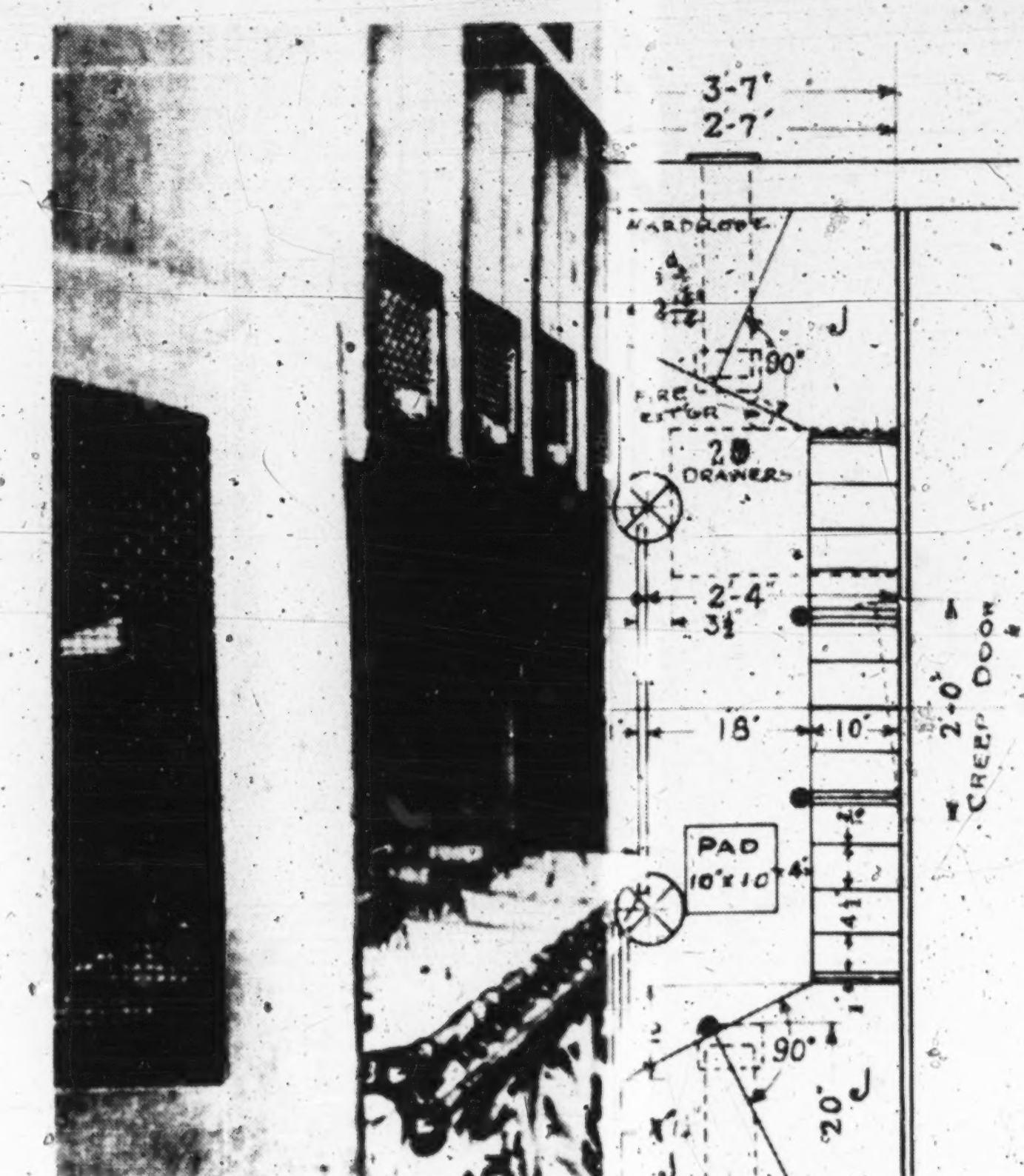
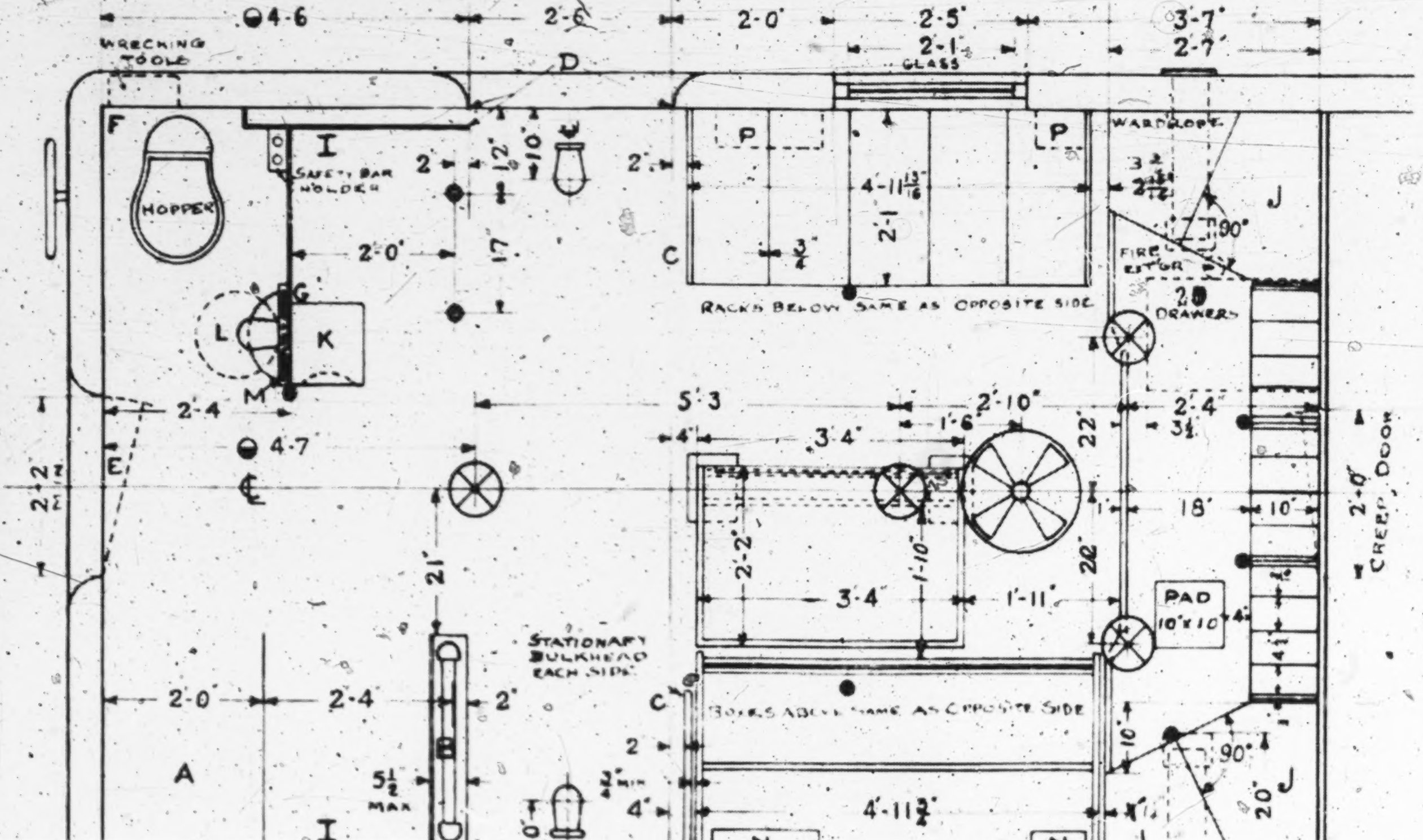
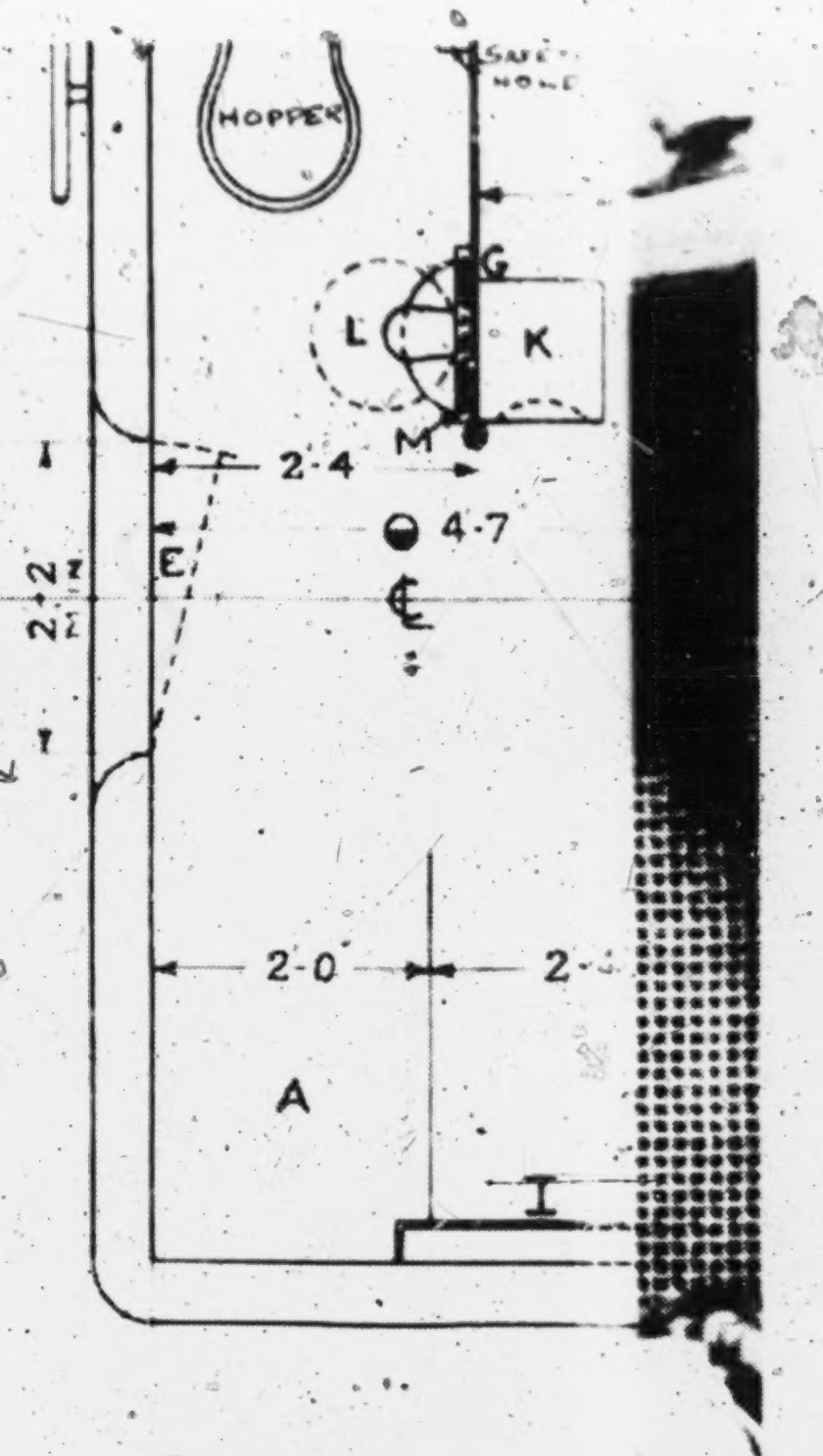
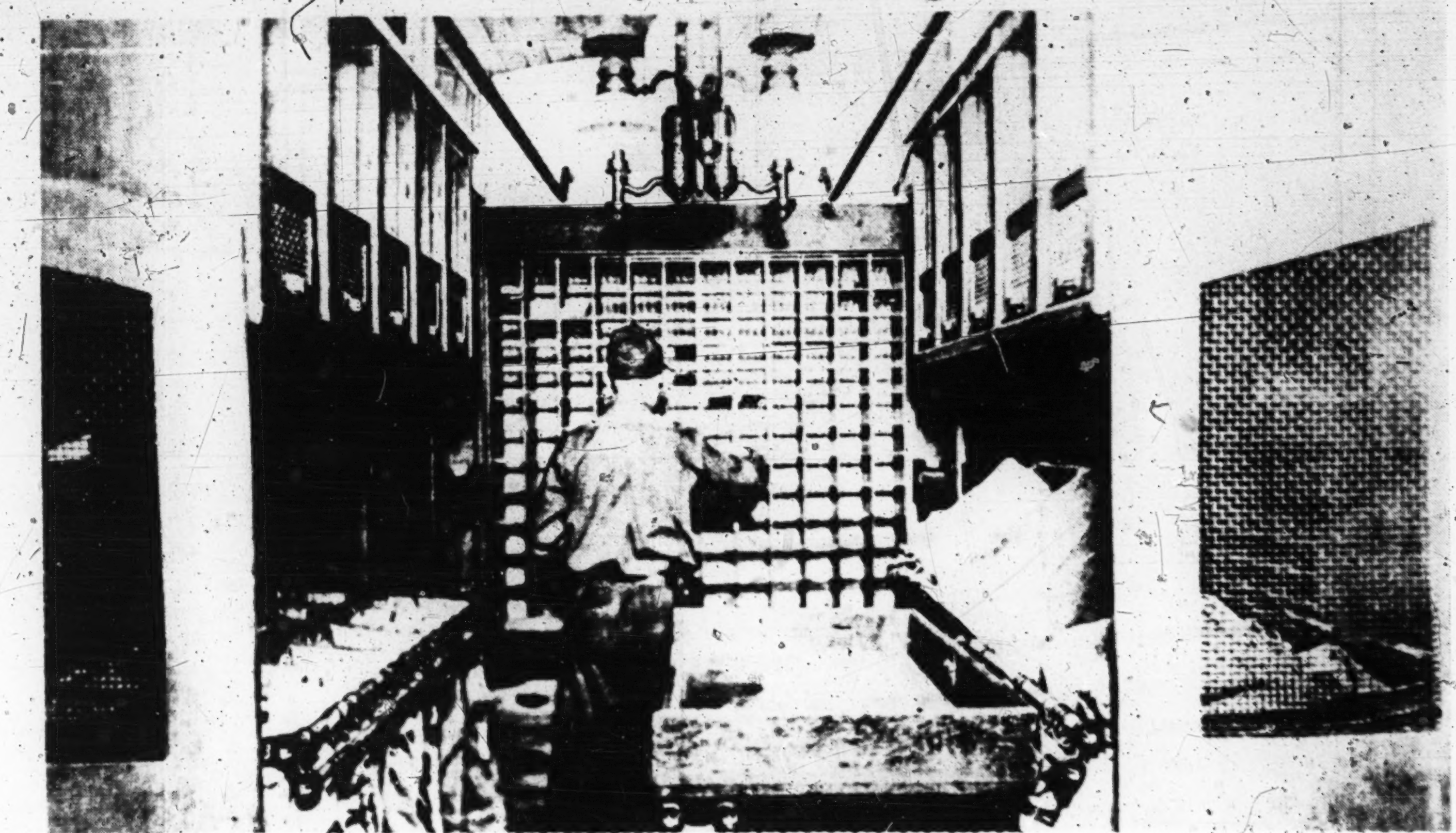


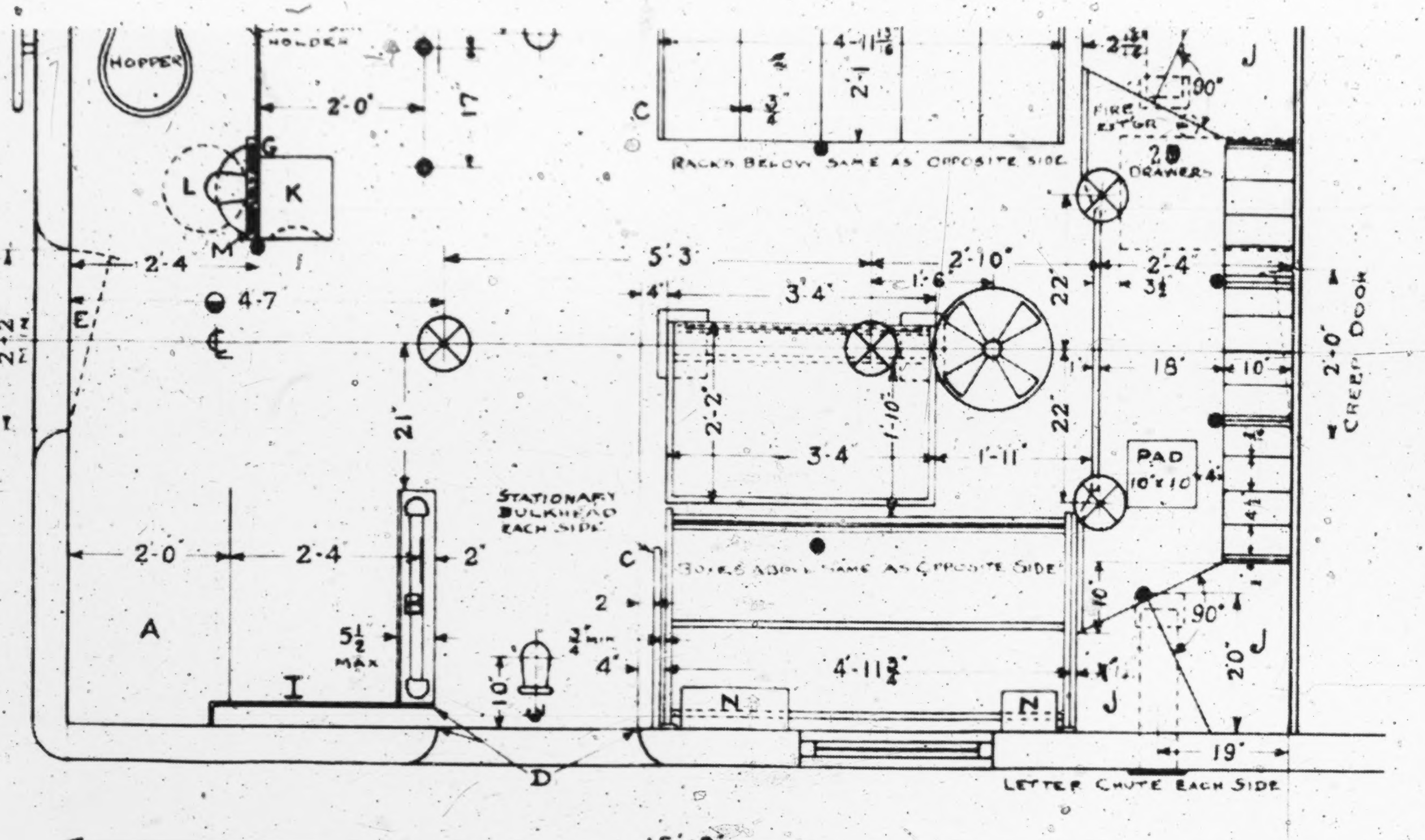
DIAGRAM OF ENTIRE 15 FEET



DISTRIBUTING END

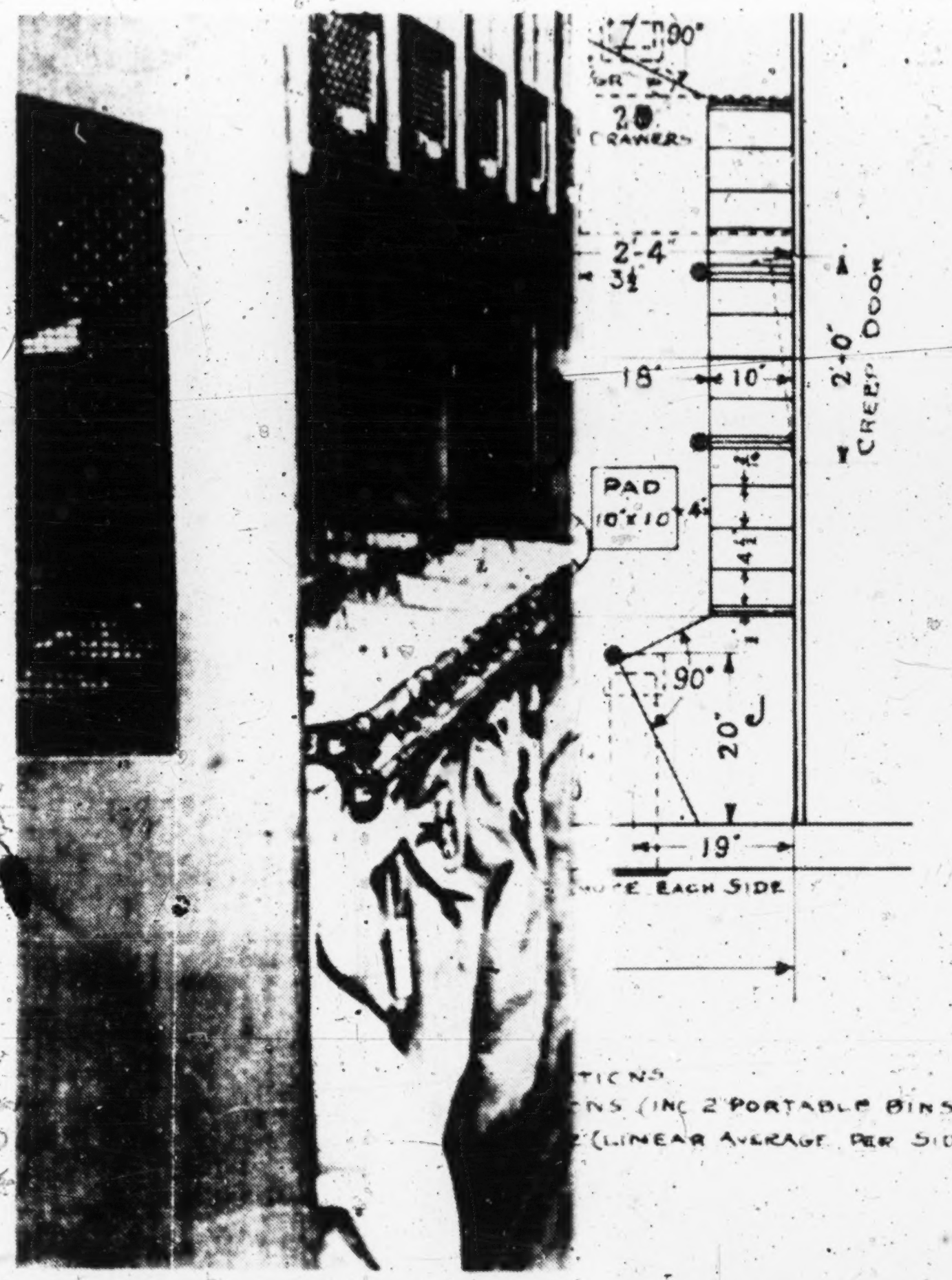


FLOOR PLAN FOR



FLOOR PLAN FOR 15' MAIL APARTMENT

(144 LETTER SEPARATIONS  
 49 PAPER SEPARATIONS (IN 2 PORTABLE BINS)  
 3" 2" STORAGE STALL (LINEAR ALKALY DES SIDE)



- (1) A 15-Ft. Apartment is a Post Office in which a Postman Receives, Assorts and De... Receives, Assorts and Delivers Mail in Transit (The rate covers: (A) Office space, with light, heat and service... (B) Transportation of Postman (C) and the Mail) ... n Run
- (2) The Mail Volume is Heavy at some Stages and Light at Others — but Space must be S — but Space must be Sufficient for Maximum use anywhere on Run
- (3) A 15-Ft Apartment is the Minimum size of Travelling Post Office



## COPY

PLAN 2, AS THE APPROVED AND STANDARD METHOD FOR THE  
APPORTIONMENT OF UNUSED SPACE IN COMBINATION AND  
MIXED CARS

In the original railway mail pay case (56 I.C.C. 1), after mature consideration of the merits of various methods proposed by the carriers and the Post Office Department for the fair apportionment of unused space in combination and mixed cars, the Interstate Commerce Commission gave its approval to Plan 2 of the Post Office Department, and that method has been followed in all subsequent mail pay cases before that Commission.

In the second railway pay case methods for the apportionment of unused space were further discussed, and Plan 2 reconfirmed, as follows:

"The cost study is based upon space data obtained during the 35-day period from September 16 to October 20, 1925. The total space operated in passenger-train service was reported, together with space operated for passenger service proper (including baggage and miscellaneous), express and mail services, and the unoccupied space in combination and mixed cars. The forms upon which data were reported were agreed upon by the department and the carriers.

In general, space in full cars was assigned to the service for which the car was used. Combination cars are cars partitioned off for the carriage of more than one kind of traffic, such as passenger-baggage, passenger-express, passenger-mail, baggage-express, and baggage-mail cars. Mixed cars are those without partitions in which are carried two or more classes of traffic. Space in combination cars was allocated by the carriers according to the space used. The authorized mail space was considered the space used and was directly allocated. Traffic, other than mail, in the baggage end of such cars and in mixed cars was measured and space allocated accordingly." (144 I.C.C. 675, 679).

\* \* \* \* \*

235 "There is no disagreement as to the total-car-foot miles of service operated. There is disagreement as to the disposition that should be made of the unused space. The greater part of such space was operated

in connection with combination and mixed cars." (144 I.C.C. 675, 680).

"We have considered the combination cars to be a mixed traffic car and have dealt with the unused space therein in the same manner as in any other mixed cars irrespective of the existence of the partition separating the apartment from the rest of the car." (144 I.C.C. 675, 681).

### PLAN I

"In Plan I, apartments in combination cars are segregated. *Space in passenger apartments is allocated to passenger service, space in mail apartments is allocated to mail service and the unused space in the remainder of the car, or baggage end, combined with the unused space in mixed cars, is apportioned to passenger, express, and mail services on the ratio of space used by each service in the baggage end of combination cars and in mixed cars. The apartments in combination cars are not apportioned any part of the unused space in the baggage end of such cars.* Plan I is based upon the assumption that an apartment is complete in itself, that it is operated independently of the remainder of the car and is not responsible for any unused space necessarily operated in the said remainder of the car. The department contends this theory is justified upon the ground that an apartment carries its own unused space." (144 I.C.C. 675, 681).

### PLAN II

"Plan 2 recognizes the fact that an apartment is only a fraction of a car; that the operation of that fraction requires the operation of a whole car and that the operation of a whole car necessarily causes the operation of a certain amount of unused space in the remainder of the car. *The justification for apportioning some of this unused space to the service using the apartment in that the car is the unit of operation and that the unused space outside the apartment, necessarily operated in a combination car to supply the space required for service in such cars, is due to the apartment service as much as the services in the baggage end.*" (144 I.C.C. 675, 681).

"In Plan 2, the apportionment is made according to the method used by us in the original case and used by the carriers in the instant case, that is, in proportion to the space used by each service in other than full cars." (144 I.C.C. 675, 680):

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### PLAN 3

"Subsequent to the hearing the department submitted another plan, referred to as Plan 3, for apportioning unused space in combination and mixed cars. The method is simply to apportion such space, in proportion to the total space used by each service including, in the divisor, space in full cars as well as space in mixed and combination cars." (144 I.C.C. 675, 689).

\* \* \* \* \*

"Plan 3 is based upon a different theory of apportioning unused space from that employed either in Plan 1 or Plan 2. In all the plans, except in Plan 3, and, to a lesser extent in Plan 1, the car is taken at the operating unit." (144 I.C.C. 675, 689).

\* \* \* \* \*

"Cars devoted exclusively to one class of service (full cars) are considered properly chargeable only with the unused space in such cars and not with any portion of the unused space in other than full cars. This direct assignment of unused space in full cars is proper because such space is necessarily operated in connection with only the full cars. Cars used for two or more services (combination and mixed cars) are considered to be operated for those services and the unused space therein is considered as necessarily operated in connection with them. Direct assignments of the unused space in such cars is not possible because the amount properly assignable to each service using these cars cannot be directly determined. An apportionment must, therefore, be made. This apportionment is made in Plan 2, and in the plan used by us in the original proceeding, upon the ratios of space used by each service in such cars the authorized space being taken as the space used in the case of the mail. In plan 3, the unused space in these cars is also apportioned, but the apportionment is made upon the ratios of space used in such cars and the entire space in full cars. This method of apportionment is justified by the department upon the theory that the combination and mixed cars are not operated in common only for the services using them but are operated in direct relationship to full car operations. The department



contends that Plan 3 is the completion of the method used in Plan 2 perfected by extending it to take in the whole train. It is clear, however, that Plan 3, in part rejects the car as the unit, and uses the total allocated train space in apportioning the unused space in other than full cars. This is not an extension of Plan 2, but a departure from it. It can be justified only if it can be shown that the unused space in combination and mixed cars is necessarily operated in connection with full cars. It is argued that there is a relationship between the space used for baggage in combination and mixed cars and the space in full passenger cars in that baggage is carried for passengers in full cars as well as for passengers in combination cars. The space used for baggage in combination and mixed cars is not measured by the use made by passengers in full passenger cars. At the most, it is related only to the proportion of space used by the passengers in full cars for whom baggage is carried in combination and mixed cars. No operating relationship is shown in the record between mail space, express space, and miscellaneous space in combination and mixed cars, on the one hand, and mail space, express space, and the services included as miscellaneous, in full cars, on the other. Space in combination and mixed cars is not operated because of the operation of full cars, except to the limited extent noted in connection with baggage, but because of the requirements for service in less than full cars. (144 I.C.C. 675, 690).

\* \* \* \* \*

"With respect to mail service, for example, 12 units of space are employed, only 3 of which are full-car units. Of the remainder, two are 30-foot, three are 15-foot, two are 7-foot, and two are 3-foot units. No operating relationship has been shown between the full-car units and the less than full-car units which would warrant charging full cars with some of the unused space in less than full cars."

"It is not necessary further to discuss Plan 3. The method suggested by us in the original proceeding, although not meeting the full claims of either the department or the carriers, is a reasonably fair method of determining the amounts of unoccupied space chargeable to each service." (144 I.C.C. 675, 691).

# PLAINTIFF'S EXHIBIT 21

DEMONSTRATION OF THE "30 FOOT APARTMENT" FALLACY  
(CONTENTION ON THIS POINT WAS NOT EVEN RAISED IN THE  
ORIGINAL PROCEEDING BEFORE THE INTERSTATE COMMERCE  
COMMISSION)

WHEN A 30 FOOT POST OFFICE IS FURNISHED ON A 15 FOOT AUTHORIZATION



MATHEMATICALLY DEMONSTRATED

COMBINATION CAR - 60 FT	FT	PERCENT
MAIL USED	15	12.5
MAIL UNUSED	15	12.5
BAG & EXP USED	15	12.5
BAG & EXP UNUSED	15	12.5
PASSENGER CAR - 60 FT		
PASSENGER USED	60	50.0
TOTAL	120	100.00

WHEN A 15 FOOT POST OFFICE IS FURNISHED ON A 15 FOOT AUTHORIZATION



COMBINATION CAR - 60 FT		
BAG & EXP USED	15	12.5
MAIL USED	15	12.5
30 FT UNUSED		
MAIL PROPORTION	15	12.5
BAG & EXP PROPORTION	15	12.5
PASSENGER CAR - 60 FT		
PASSENGER USED	60	50.0
TOTAL	120	100.00

(NOTE 1.) NO OTHER UNUSED SPACE IS CHARGED TO MAIL.

(NOTE 2.) ALL SPACE IN FULL PASSENGER CARS IS CHARGED AGAINST PASSENGER SERVICE, EVEN IF ONLY PARTLY LOADED.

(ON NO DAY DURING THE 28 DAY TEST PERIOD SEPT. 28 TO OCT. 25 - 1931 WAS THERE INSUFFICIENT SPACE IN THE COMBINATION CAR FOR BAGGAGE AND EXPRESS)

THE AMOUNT OF UNUSED SPACE IS THE SAME REGARDLESS OF THE POSITION OF THE PARTITION

THE MAIL'S PROPORTION OF TOTAL TRAIN SPACE IN EACH EXAMPLE IS EXACTLY THE SAME



## Plaintiffs' Exhibit 24

**TOTAL OPERATING REVENUES, MAIL REVENUES AND NET RAILWAY OPERATING INCOME PER MILE OF ROAD  
GEORGIA & FLORIDA R.R. COMPARED WITH ALL CLASS I AND CLASS II RAILWAYS IN THE UNITED STATES  
CALENDAR YEARS 1931 TO 1938 INCLUSIVE**

	AVERAGE MILES OF ROAD OPERATED (All Services)	TOTAL OPERATING REVENUES		MAIL REVENUES		NET RAILWAY OPERATING INCOME	
		Amount	Per Mile Road	Amount	Per Mile Road	Amount	Per Mile of Road
	1	2	3 = 2 ÷ 1	4	5 = 4 ÷ 1	6	7 = 6 ÷ 1
<b>YEAR 1931</b>							
GEORGIA & FLORIDA RR	463.61	\$ 1,357,711	\$ 2,929	\$ 37,904	\$ 82	Def. \$ 92,091	Def. \$ 199
Class I Rys.—U. S. (155)	242,175.83	4,188,343,244	17,295	105,423,015	435	525,627,852	2,170
Average Miles Per Road	1,562.42						
Class II Rys.—U. S. (233)	12,737.34	47,830,221	3,755	*	*	3,363,665	264
Average Miles Per Road	57.12						
<b>YEAR 1932</b>							
GEORGIA & FLORIDA RR	463.61	818,829	1,766	35,716	77	Def. 200,009	Def. 431
Class I Rys.—U. S. (151)	241,519.24	3,126,760,154	12,946	97,161,716	402	326,298,008	1,351
Average Miles Per Road	1,599.46						
Class II Rys.—U. S. (229)	12,725.15	34,435,580	2,706	*	*	220,100	17
Average Miles Per Road	55.56						
<b>YEAR 1933</b>							
GEORGIA & FLORIDA RR	465.00	975,719	2,098	35,533	76	Def. 21,191	Def. 46
Average Miles Per Road							
Class I Rys.—U. S. (150)	240,631.00	3,095,403,904	12,864	91,870,415	382	474,295,613	1,971
Average Miles Per Road	1,604.20						
Class II Rys.—U. S. (211)	12,451.00	35,332,034	2,838	*	*	3,443,699	277
Average Miles Per Road	59.00						
<b>YEAR 1934</b>							
GEORGIA & FLORIDA RR	454.00	1,029,239	2,267	33,770	74	Def. 61,605	Def. 136
Class I Rys.—U. S. (144)	238,951.00	3,271,566,822	13,691	91,139,847	381	462,652,379	1,936
Average Miles Per Rd.	1,659.38						
Class II Rys.—U. S. (196)	11,845.00	37,091,034	3,131	*	*	3,322,334	280
Average Miles Per Rd.	57.50						
<b>YEAR 1935</b>							
GEORGIA & FLORIDA RR	409.00	1,093,704	2,674	27,063	66	19,177	46
Class I Rys.—U. S. (144)	237,932.00	3,451,929,411	14,508	92,052,257	387	499,819,118	2,101
Average Miles Per Rd.	1,652.30						
Class II Rys.—U. S. (196)	11,168.00	38,680,042	3,463	*	*	5,298,794	474
Average Miles Per Rd.	56.97						
<b>YEAR 1936</b>							
GEORGIA & FLORIDA RR	409.00	1,181,662	2,889	27,160	66	Def. 13,859	Def. 34
Class I Rys.—U. S. (139)	236,878.00	4,052,734,139	17,109	95,574,820	403	667,347,115	2,817
Average Miles Per Rd.	1,704.15						
Class II Rys.—U. S. (189)	11,053.00	45,987,534	4,161	977,306	88	7,427,537	672
Average Miles Per Rd.	58.48						
<b>YEAR 1937</b>							
GEORGIA & FLORIDA RR	408.00	1,291,201	3,165	26,381	65	34,875	85
Class I Rys.—U. S. (136)	235,376.00	4,166,068,602	17,700	97,983,876	416	590,203,925	2,507
Average Miles Per Road	1,730.70						
Class II Rys.—U. S. (193)	11,439.00	50,359,901	4,402	974,892	85	7,013,623	613
Average Miles Per Road	59.27						
<b>YEAR 1938</b>							
GEORGIA & FLORIDA RR	408.00	1,111,065	2,723	26,457	65	Def. 37,028	Def. 91
Class I Rys.—U. S. (136)	234,482.00	3,565,490,753	15,206	95,963,353	409	372,873,771	1,590
Average Miles Per Road	1,724.13						
Class II Rys.—U. S. (190)	10,862.00	42,028,546	3,869	885,724	82	3,853,061	355
Average Miles Per Road	57.17						

\* No available.

Def.—Deficit.

Source: Statistics of Railways in the United States Published by the I. C. C. Annually.

COPY

EXTRACTS CONCERNING SPECIAL CONTRACTS  
WITH RAILROADS

FROM

POST OFFICE DEPARTMENT APPROPRIATION BILL FOR 1946,  
Hearings before the Subcommittee of the Committee  
on Appropriations House of Representatives,  
79th Congress First Sessions on the  
POST OFFICE DEPARTMENT APPROPRIATION BILL  
for 1946.

(January 8, 1945)

Page 156. *Apportionment of Appropriation*

Mr. LUDLOW. This appropriation covers railroad transportation and mail-messenger service?

Mr. PERDUM. Yes, sir.

Mr. LUDLOW: How is that apportioned?

Mr. STEPHENSON. It is not apportioned; we use what is necessary for either mail-messenger service or for railroad transportation.

Mr. LUDLOW. How is that divided; what is the volume of each?

Mr. STEPHENSON. For regular railroad service, 1945, the estimated cost is \$113,951,431; for emergency service, \$20,005,845; and for special contracts \$149,521; a total for railroad service of \$134,106,797. The total estimated cost for 1945 for mail-messenger service amounts to \$11,571,141.

*Difficulty in Obtaining Railroad Space*

Mr. LUDLOW. In view of the enormous volume of mail to be handled, do you find difficulty in getting railroad space?

Mr. PERDUM. I might answer that in this way, Mr. Chairman. At times the railroad companies are a little hard put, owing to the great demands made upon the rail-

Page 157. roads by our military forces. But the railroads have cooperated in a most splendid manner, and I think we have gotten along very well in that respect.

As a matter of fact, I think the cooperation between the railroad companies and the Post Office Department during the past holiday season has been something for which we can particularly feel very grateful.

There were several points last year at large railroad stations where there was congestion. The year before last we had serious congestion at the railroad station in Washington, D. C.

241 By our officials working closely together with the railroad officials and laying their plans early, beginning the real work months before the holiday season, during the past holiday season we did not have any real congestion at any railroad point.

Mr. LUDLOW. Your emergency requirements are unpredictable, of course. Do you find the railroad companies responsive and able to meet your requirements?

Mr. PURDUM. They are most responsive, Mr. Ludlow, and invariably they meet our requirements.

### *Number of Contracts with Railroads*

Mr. LUDLOW. With how many railroad companies do we have contracts for the transportation of mail?

Mr. STEPHENSON. There are 255 railroad companies engaged in transportation of the mails.

Mr. LUDLOW. How many routes?

Mr. STEPHENSON. Five hundred and thirty-one routes.

Mr. LUDLOW. Are a good many trains still being discontinued, thus putting the mail on star routes?

Mr. PURDUM. Very few at present and for sometime past.

Mr. LUDLOW. Do you know how many were discontinued during 1944?

Mr. PURDUM. We can furnish that information for the record. There were 24 trains discontinued during the fiscal year 1944.

### *Special Railroad Contracts*

Mr. LUDLOW. You spoke a few minutes ago about your special contracts. Will you put a list of those special contracts into the record? They are found on page 502 of the justifications.

Mr. PURDUM. Yes, we will put that in the record.

#### *SPECIAL RAILROAD CONTRACTS IN EFFECT ON JULY 1, 1944*

Company	Contract rate per annum	Estimated cost per annum at regular railroad rates	Increase over regular rates
Denver & Rio Grande Western RR Co.	\$ 35,000.00	\$ 21,715.09	\$ 13,285.00
Rio Grande Southern Railroad Co.	40,000.00	12,232.00	27,768.00
The Alaska Railroad (Government RR)	61,390.00	36,412.00	24,978.00
Pacific & Atlantic Railway & Navigation Co.	1,723.40	788.00	1,005.40
Hudson & Manhattan Railroad Co.	21,000.00	6,120.00	14,880.00
TOTAL	\$159,183.40	\$ 77,267.00	\$ 81,916.40



Mr. LUDLOW. Tell us what gave rise to special contracts? Why should there be special contracts?

Mr. PURDUM. These special contracts, of which there are five in number, are based on legal authority, and are granted by reason of very extraordinary conditions in the areas in which these railroads operate.

First, the Denver & Rio Grande Western Railroad Co., operating from Thistle to Marysville, Utah, 132.20 miles, seven times a week by passenger trains each way, and as much oftener as any trains may run, including a 30-foot apartment car service, from July 1, 1944 to June 30, 1946. The special rate is authorized because of the additional train facilities afforded by the railroad company to meet the postal requirements. The cost of the mail service by train, is less expensive and more satisfactory than by any other means. This line supplies approximately 20 post offices, and is also a base of supply for several star routes;

Then we have the Rio Grande Southern Railroad Co., which operates from Ridgway via Telluride to Durango, Colo., 169.89 miles, seven times a week each way, and as much oftener as trains may run, and one additional trip seven times a week from Dolores to Durango, 60.26 miles, from July 1, 1944 to June 30, 1945. The special rate is authorized because of the high cost of railroad operation on this line which serves a large part of the southwestern portion of the State of Colorado. The railroad traverses a very mountainous district in which there are unusually heavy grades and, in winter, heavy snows.

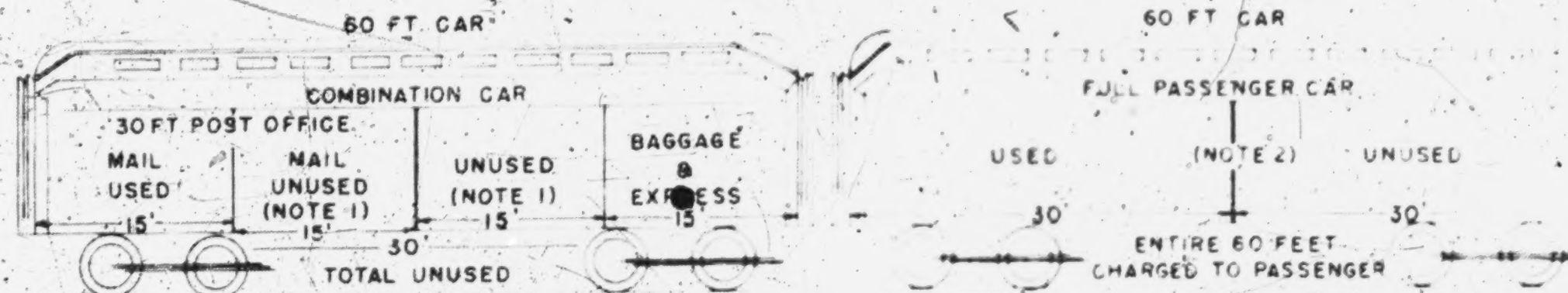
Then we have The Alaska Railroad, running from Seward and Whittier to Fairbanks, Alaska, with branches 505 miles, twice a week each way, and as much oftener as trains may run, from July 1, 1944 to June 30, 1946. The special rate is authorized because of the high cost of labor and materials in Alaska in connection with operation through a mountainous district where there is heavy snowfall and unusually low temperature in winter, and general operating expenses on that account are heavy.

Then we have the Pacific & Arctic Railway & Navigation Co., which operates from Skagway to White Pass, Alaska, a distance of 20.40 miles, six times a week each way from June 11 to September 30, and twice a week each way from October 1 to June 20; and as much oftener as trains may run, from July 1, 1944 to June 30, 1946.

243 The special rate is authorized because the service is performed on a road having a grade of approximately 4 percent through a mountainous district where

DEMONSTRATION OF THE "30 FOOT APARTMENT" FALLACY  
(CONTENTION ON THIS POINT WAS NOT EVEN RAISED IN THE ORIGINAL PROCEEDING BEFORE THE INTERSTATE COMMERCE COMMISSION)

WHEN A 30 FOOT POST OFFICE IS FURNISHED ON A 15 FOOT AUTHORIZATION

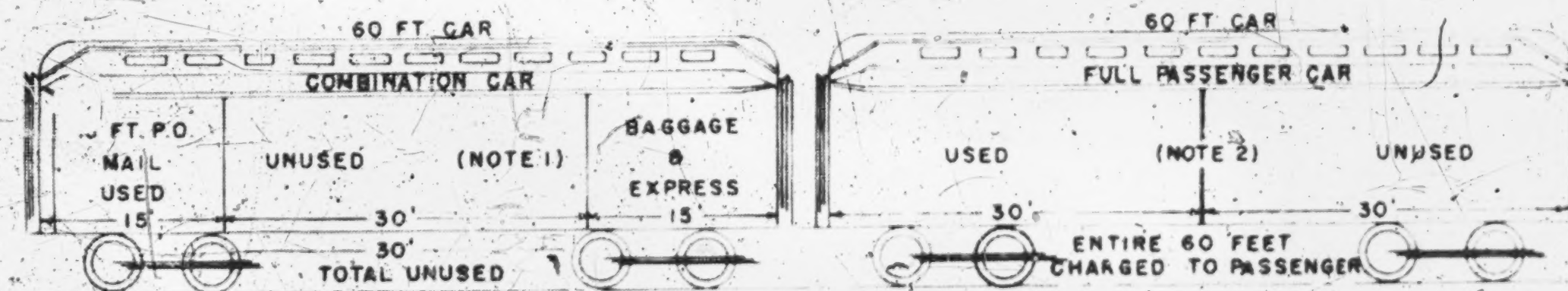


MATHEMATICALLY DEMONSTRATED

COMBINATION CAR - 60 FT	FT	PERCENT
MAIL USED	15	12.5
MAIL UNUSED	15	12.5
BAG & EXP USED	15	12.5
BAG & EXP UNUSED	15	12.5
PASSENGER CAR - 60 FT		
PASSENGER USED	60	50.0
TOTAL	120	100.00

25%

WHEN A 15 FOOT POST OFFICE IS FURNISHED ON A 15 FOOT AUTHORIZATION



COMBINATION CAR - 60 FT		
BAG & EXP USED	15	12.5
MAIL USED	15	12.5
30 FT UNUSED		
MAIL PROPORTION	15	12.5
BAG & EXP PROPORTION	15	12.5
PASSENGER CAR - 60 FT		
PASSENGER USED	60	50.0
TOTAL	120	100.00

25%

(NOTE 1) NO OTHER UNUSED SPACE IS CHARGED TO MAIL.

(NOTE 2) ALL SPACE IN FULL PASSENGER CARS IS CHARGED AGAINST PASSENGER SERVICE, EVEN IF ONLY PARTLY LOADED.

(ON NO DAY DURING THE 28 DAY TEST PERIOD SEPT. 28 TO OCT. 25 - 1931 WAS THERE INSUFFICIENT SPACE IN THE COMBINATION CAR FOR BAGGAGE AND EXPRESS)

THE AMOUNT OF UNUSED SPACE IS THE SAME REGARDLESS OF THE POSITION OF THE PARTITION

THE PROPORTION OF SPACE CHARGEABLE TO THE MAIL IS THE SAME (25%) REGARDLESS OF THE POSITION OF THE PARTITIONS. FOR, IF THE AMOUNT OF UNUSED SPACE IN A COMBINATION CAR WAS 30 FT. ANYHOW, OBVIOUSLY IT COULD MAKE NO DIFFERENCE IF A CAR WITH A 30 FT. PARTITION WAS SUPPLIED ON AN AUTHORIZATION FOR ONLY 15 FT. SINCE THE TOTAL EXCESS SPACE IS JUST THE SAME.

THE MAIL'S PROPORTION OF TOTAL TRAIN SPACE IN EACH EXAMPLE IS EXACTLY THE SAME



difficulties are encountered on account of snow blockades in winter, and in summer by high water. These conditions affecting the service result in expensive operation.

Then, lastly we have the Hudson and Manhattan Railroad Co. This short line operates from the Hudson Terminal Station, New York, to Journal Square, Jersey City, N. J., 3.21 miles, as often as required (there are approximately 25 round trips daily except Sunday performed) from July 1, 1944 to June 30, 1945. The special rate is authorized on account of the particular conditions which cause a high cost of performance of the service. The railroad extends from Hudson Terminal Station in New York City through the Hudson Tunnels to Journal Square in Jersey City. It connects at the latter point with the Pennsylvania Railroad Co., which completes the through line for mail and passengers direct from lower Manhattan to Newark where connection is made with the trains for the

South and West. This road is used to carry a very heavy letter mail on frequent trips and advances materially the very important mails for the lower portion of New York City. The company is required to maintain a force of employees at the terminal station for the sole purpose of handling the mails in addition to the high cost of transportation through its specially constructed roadway under the Hudson River.

Mr. PURDUM. Yes, sir. Special contracts have been in existence for quite a period of time, and they appear to be fully justified.

244

FROM

POST OFFICE DEPARTMENT APPROPRIATION BILL FOR 1947.  
Hearings before the Subcommittee of the Committee  
on Appropriations House of Representatives,  
79th Congress, Second Session of the.

POST OFFICE DEPARTMENT APPROPRIATION BILL FOR 1947.  
(December 5, 1945)

Page 249. *Contracts With the Railroads for the  
Transportation of Mail*

Mr. LUDLOW. How many contracts do you have with the railroads for the transportation of mail?

Mr. STEPHENSON. There are 255 railroad companies. We had 268 routes operated by the 255 railroad companies.

Page 250.

Mr. LUDLOW. Has the number increased or decreased?

Mr. STEPHENSON. The number of railroads did not change in 1945.

Mr. LUDLOW. Quite a number of trains have been discontinued in recent years. Has the discontinuance of trains ceased now?

Mr. STEPHENSON. Some of the trains which were discontinued have been restored.

### *Emergency Service*

Mr. LUDLOW. Is the emergency service paid for on the same basis as the regular service?

Mr. STEPHENSON. Yes, sir; the same rate.

Mr. LUDLOW. Do you experience any difficulty in securing emergency service or not?

Mr. STEPHENSON. No, there is no difficulty at all. The railroads are very cooperative in furnishing equipment. It is true that they cannot furnish the type of equipment that we use ordinarily because the armed forces required a great deal of the passenger and baggage equipment, and we must necessarily depend on getting by with the use of freight cars, refrigerator cars, and automobile cars, and everything like that to perform the service.

Mr. LUDLOW. Is there much loss through your inability to utilize the space on returned trips?

Mr. STEPHENSON. No, sir; there is not. By the use of freight equipment we relieve ourselves of considerable of the return movement, because we do not pay for the return movement of freight cars, only when they are operated in passenger trains like passenger cars would be operated under normal conditions.

245 Mr. LUDLOW. I was thinking that the space in those returning cars might be utilized by other services in the transportation of household goods, and so forth.

Mr. STEPHENSON. What do you mean by other services; do you mean other departments?

Mr. LUDLOW. Yes; is that done?

Mr. STEPHENSON. No; that is not done at all.

Mr. LUDLOW. The Government pays large sum of money, in the aggregate, for transporting household goods of certain public servants from one place to another. Why could not that space be utilized?

Mr. STEPHENSON. I think the utilization of that space, Mr. Ludlow, by other than the Post Office Department might seriously handicap us in needed transportation of the mail.

Mr. LUDLOW. I do not know. I was just exposing a little economy idea of mine.

*Expenditures, Four Months, 1946*

What is the first 4 months' expenditure on this item?

Mr. STEPHENSON. The 4 months' expenditure for railroad transportation and mail messenger service was \$47,668,194.

Mr. LUDLOW. What is the Christmas hump in this expenditure, would you say?

Mr. STEPHENSON. I do not understand just what you mean by that.

Mr. LUDLOW. Well, Christmas always brings about a large additional expenditure. I wonder what that would amount to on this particular item?

Page 251.

Mr. STEPHENSON. For all services for last year, 1945, the expenditures for December were \$15,609,000, which is about practically \$4,000,000 more than the months of November and January.

Mr. TABER. Your total expenditure in December of last year was what?

Mr. STEPHENSON. \$15,609,000.

Mr. LUDLOW. That would make a hump there of something like \$4,000,000?

Mr. STEPHENSON. Yes, sir, something like \$4,000,000.

*Special Railroad Contracts*

Mr. LUDLOW. Now, I wish you would tell us what the special railroad contracts are and put a list of them in the record, and why you have special contracts.

Mr. STEPHENSON. We have five special railroad contracts, the Denver & Rio Grande Railroad Co., between Thistle and Marysville, Utah; the Rio Grande Southern between  
246 Ridgway and Durango, Colo.; the Alaska Railroad, a Government railroad, operating between Seward and Whittier to Fairbanks, Alaska; the Pacific & Arctic Railway and Navigation between Skagway and White Pass, Alaska, and the Hudson & Manhattan Railroad Co., operating from Hudson Terminal Station, New York to Journal Square, Jersey City, N. J.

Mr. LUDLOW. I can see probably some reason for segregation in Alaska, but I wonder what the necessity of having these special contracts is in the United States proper.

Mr. STEPHENSON. It is due principally to the high cost of railroad operation, making the rates which are fixed by the Interstate Commerce Commission not compensatory.

Mr. LUDLOW. So that you could not get adequate service unless you had special contracts, is that it?

Mr. STEPHENSON. Well, we could compel the railroad companies to perform the service.

Mr. LUDLOW. But it would not be compensatory?

Mr. STEPHENSON. No, sir; it would not be. There are only five instances where we have special contracts. We keep away from the special contracts all we can. (Under-scoring supplied.)

Mr. LUDLOW. Are those of long standing?

Mr. STEPHENSON. Yes, they have been in effect a good many years.

Mr. LUDLOW. Is it expected that they will be permanent?

Mr. STEPHENSON. We rather expect this year that one of these routes will be terminated.

Mr. LUDLOW. Which one?

Mr. STEPHENSON. The Rio Grande Southern.

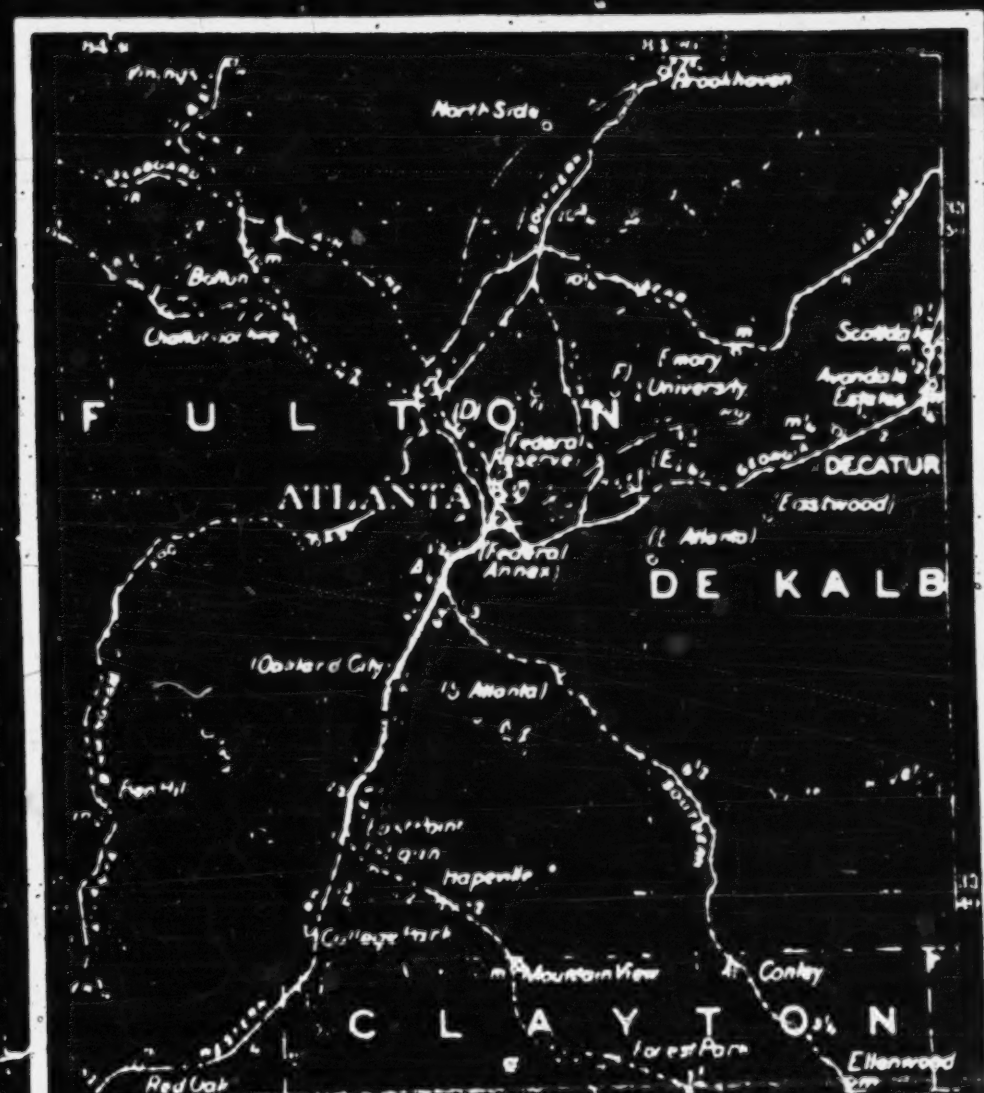
(Note: this exhibit connects up with the testimony of Defendant's witness Handy on pages 221/224 and 379/381.)





SHOWING POST OFFICES  
WITH INTERMEDIATE DISTANCES ON MAIL ROUTES

EXPLANATION				
Post Office		See a subject		
Post Office Station	Item	State Library Subject		
Post Office County Seat		State Subject Index		
Summer Post Office		Regulation of Post Office	Page	Box
Discontinued Post Office		See times a week		
Point on Route		Three times a week		
Railroad (showing station)		Twice a week		
Railway Station		See above		
* Mail times are shown		Ar. Mail Route* Authority		
Mail Messenger		Mail subject		
		See times a week and Reg. subject		



## ATLANTA AND VICINITY



## COPY

RPO ROUTES CONNECTING WITH MAIL SERVICE  
ON GA. & FLA. R.R.

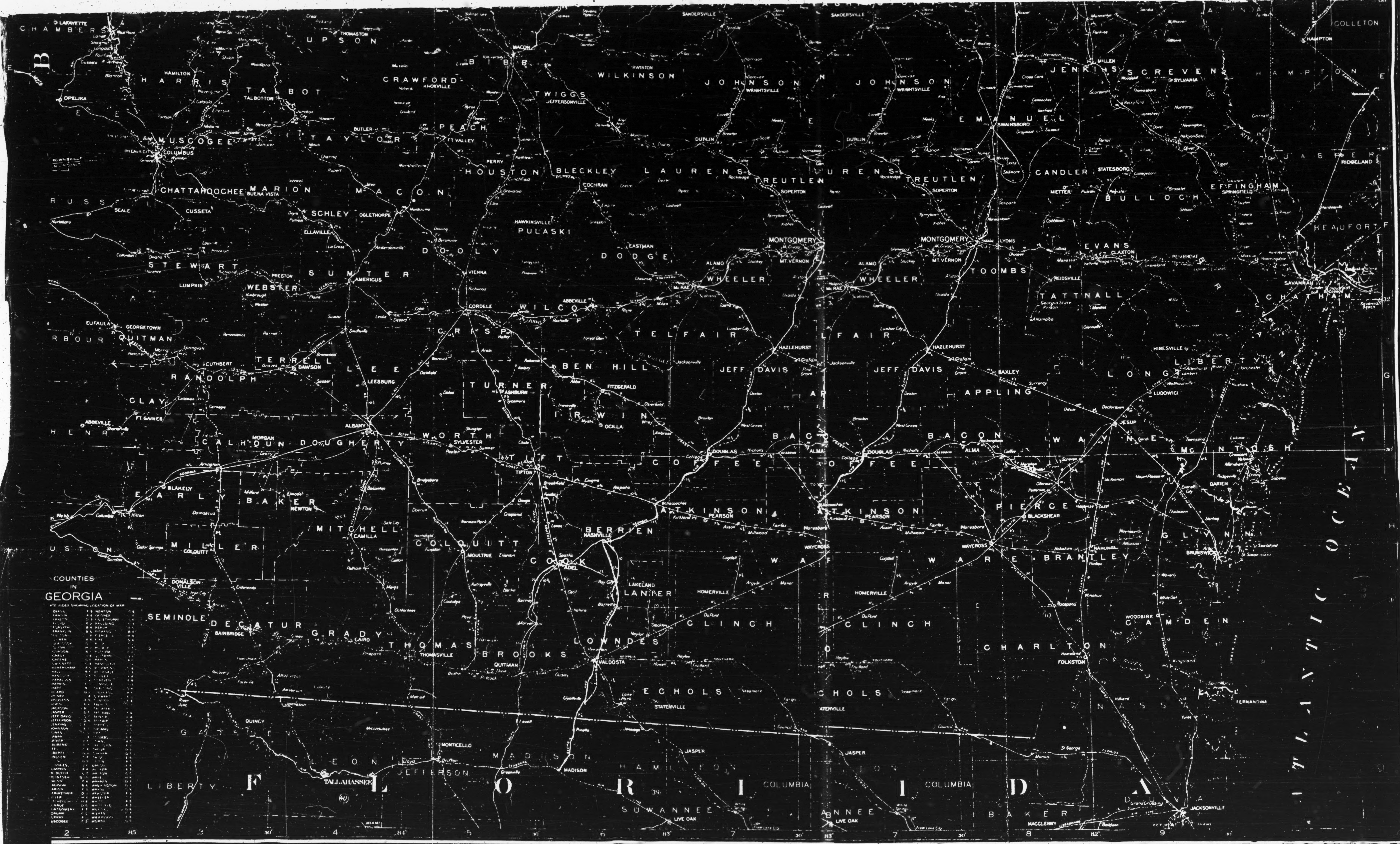
<i>Point on Georgia &amp; Florida R.R.</i>	<i>Connecting RPO Route</i>	<i>Railroad</i>	<i>Route Mileage</i>
Augusta, Georgia	Augusta & Atlanta RPO	Ga. R.R.	171.17
	Charlotte & Augusta RPO	So. Ry.	191.47
	Branchville & Augusta RPO	So. Ry.	75.56
	Wilmington & Augusta RPO	ACL R.R.	277.24
	Augusta & Point Royal RPO	C&WC Ry.	113.38
Midville, Georgia	Atlanta & Savannah RPO	Central of Ga. Ry.	293.61
Vidalia, Georgia	Savannah & Montgomery RPO	SAL Ry.	338.12
	Macon & Vidalia RPO	MD&S R.R.	92.90
Hazelhurst, Georgia	Atlanta & Jack. RPO	So. Ry.	330.89
Douglas, Georgia	Atlanta & Waycross RPO (Atlanta to Brunswick, mileage 330.41)	AB&C R.R.	278.57
Willacoochee, Georgia	Waycross & Albany RPO	ACL R.R.	111.73
Valdosta, Georgia	Atlanta, Valdosta & Jack. RPO (GS&F. Ry., mileage 261.82)	GS&F Ry.	349.64
	Waycross & Montgomery RPO	ACL R.R.	314.65
	Valdosta & Palatka RPO	GS&F Ry.	134.01
Madison, Florida	Jack. & Pensacola RPO	SAL Ry.	

(Jack. to River Junction, mileage 208.25)

(L&amp;N R.R. River Junction to Pensacola 160.67)







COUNTIES IN GEORGIA

KEY INDEX SHOWING LOCATION OF MAP

ALBANY	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	100
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250

*Defendant's Exhibit No. 7*

Copy

Form 5196

SUBJECT:

In Reply Mention  
Initials, Subject, and DateRAILWAY MAIL SERVICE  
OFFICE OF CHIEF CLERK, DISTRICT

Atlanta, Ga., October 10th, 1938

Mr. I. R. White, Supt. Trans.  
Georgia & Florida Railroad Co.  
Augusta, Georgia

Dear Sir:

Investigation is being made as to the comparative costs of rail service compared to motor car or star route service on the Augusta & Madison R. P. O. between Augusta and Valdosta.

Please advise if the loss of mail pay would seriously affect the finances of the railroad if this service were eliminated, and if train service would likely be curtailed or eliminated on the line, and if the train service were eliminated or curtailed, would the communities involved be discommoded or affected adversely, by the loss of railroad service.

Respectfully,

.....  
*Chief Clerk, District 8*

JHB:a

251

*Defendant's Exhibit No. 8*

Copy

GEORGIA & FLORIDA RAILROAD  
W. V. GRIFFIN AND H. W. PURVIS, RECEIVERSI. R. WHITE,  
SUPERINTENDENT TRANSPORTATION

FILED AUGUSTA, GA. October 25, 1938. W:H.

MAR 20 1946

COURT OF CLAIMS

Mr. J. H. Bibb,  
Chief Clerk, District 8,  
Railway Mail Service,  
Atlanta, Ga.

Dear Sir:

This will acknowledge your letter October 10th advising that investigation was being made to determine compara-

tive costs of rail service between star route service on the highways and our train service.

The loss of revenue for handling the mails would seriously affect the finances of the railroad and would undoubtedly curtail train service or eliminate passenger train service entirely; in fact I am not sure but that the loss of the mail revenue would result in abandonment of the railroad.

At the present time, we operate passenger or mixed train service in both directions over the territories named, and the trains which handle the mails are the only trains operated giving passenger, express and mail service to the communities. The withdrawal of the trains would seriously affect the communities and the abandonment of the railroad would be disastrous to many of the communities.

The Georgia & Florida Railroad began operation in the year 1906 and has contributed a great deal to the development and growth of the section of Georgia and Florida through which it operates. The railroad is comparatively young and while the development has been constant, the railroad has had a difficult time financially due to development of competitive forms of transportation. The worth and value of the railroad to the communities and to the territory it serves is unquestioned.

During the first nine months of the current year, revenues amounted to \$839,230.00. Operating expenses amounted to \$785,223.00, leaving a net revenue from operations of \$54,007.00. Railroad tax accruals under the tax laws of the states, Social Security Acts and federal railroad taxing act amount to \$68,594.00. Equipment rents and joint facility rents amounted to \$16,823.00. Non-operating income amounted to \$13,459.00; deductions from income \$8,580 which created a deficit of \$26,539.00. This leaves no funds for the payment of Receivers' interest on equipment trust certificates or miscellaneous items.

252 We feel that when improvement in general business arrives, our situation will improve also and we need your assistance and the revenues for handling the mail to keep the property operating. The railroad employs approximately 700 persons at fair wages, the majority of whom would be unable to find gainful employment if the railroad should cease operating, and every dollar of revenue taken from us will, no doubt, hasten the day when it will be necessary for us to discontinue operating.

It is our desire to handle United States mails in the best manner possible under the existing conditions, and we are hopeful that we shall not be deprived of the mail revenue.

Yours very truly,

S. I. R. WHITE  
Supt. Transportation

Space Changes—Route 104781

Form 5196

Subject:

In Reply Mention

Initials, Subject, and Date

RAILWAY MAIL SERVICE

OFFICE OF CHIEF CLERK, DISTRICT

Atlanta, Ga., June 21, 1939

The General Superintendent,

Railway Mail Service,

Washington, D. C.

(1) Transmitting herewith recommendation to curtail 15 ft. apartment car service in Augusta & Madison RPO trains 4 and 5, between Douglas and Valdosta, Ga. to be superseded by 3 ft. CP service, daily except Sunday, a distance of 62.70 miles, the service, Douglas to Augusta, Ga. and return to remain the same as at present, a distance of 160.20 miles.

(2) This recommendation is in accordance with Joint Letter of September 8, 1937, in regard to minimum pay routes and mixed train service.

(3) The Augusta & Madison RPO is on the main line of the Georgia & Florida Railroad, consisting of Route 104781, Valdosta to Augusta, Ga. and return. Total mileage 222.90 miles. The Space earnings of the 15 ft. RPO unit used on this line between Valdosta and Augusta, Ga. and return is \$23593.96 per annum, for seven round trips per week. The apartment car accommodates all the mails handled on each trip.

(4) An inspection was made in train 4, May 18th, and train 5, May 19th, copy of inspection report for both trains attached hereto. In train 4 leaving Valdosta there was only one pouch received, no storage mail or sacks for distribution. There was only 10 pouches opened between Valdosta and Hazlehurst, there being 25 letter packages and one sack of papers for distribution, the major portion of which was received between Douglas and Hazlehurst, Ga. In train 5 from Hazlehurst to Valdosta there were only 9 pouches received and distribution was made of 25 letter packages and one sack, the major portion of which was received and handled between Hazlehurst and Douglas, Ga.

(5) Consideration was given the matter of establishing a Star Route to supersede the RPO service between Douglas and Valdosta, Ga. but as there is no passable road to cover all offices involved, it was not considered feasible to have a Star Route between these points.

(6) The RPO service between Valdosta and Douglas, Ga. is not needed or justified as Star Route 2151 from Val-

Valdosta to Adel, Ga. and return, affords an adequate supply for Barretts, Nashville and Ray City. Willacoochee, Ga. the only other office between Valdosta and Douglas, Ga. is served by four RPO trains on the Waycross & Albany RPO—

Train 17—daily except Sunday; Train 18, daily

94—

95

(7) The present service over the Augusta & Madison RPO costs as follows per annum:

Train 4, Valdosta to Augusta, 15 ft. Apt "A" ..... \$1,796.98

Train 5, Augusta to Valdosta, Ga. 15 ft. Apt "A" ..... 11,796.98

TOTAL COST OF PRESENT SERVICE.....\$23,593.96

254 (8) The proposed service over the Augusta Madison, RPO, Douglas to Augusta, Ga. and return, will cost as follows:

Train 4, Valdosta to Douglas, 3 ft. CP unit "B" ..... 883.12

Train 4, Douglas to Augusta, Ga. 15 ft. Apt "A" ..... 8,478.58

Train 5, Augusta to Douglas, 15 ft. Apt "A" ..... 8,478.58

Train 5, Douglas to Valdosta, 3 ft. CP "B" ..... 883.12

TOTAL COST OF SERVICE PROPOSED.....\$18,723.40

TOTAL COST OF PRESENT SERVICE.....23,593.96

TOTAL NET SAVINGS ON SPACE.....\$ 4,870.56 per annum

(9) Total net savings of \$4870.56 per annum, effected by rearrangement of space. In addition, a savings of one grade-5 clerk, \$2450, with annual leave, \$90.69 and travel allowance, \$273.75—making a total net saving of \$7685.00 per annum.

(10) It is not believed that the loss of revenue from the RPO car superseded by CP service from Douglas to Valdosta, would affect the finances of the Georgia & Florida Railroad or the operations of trains 4 and 5. This is a mixed train operated from Valdosta to Augusta and return with very little, if any, passenger travel, running very irregularly, making regular schedule approximately three times per month. We are submitting protest of the Railroad Company and petitions of protest of others, which are understood to have been instigated by the Railroad Officials. Last fall consideration was given to discontinuance of all RPO service to be superseded by Star Routes, which was the cause of the attached petition, therefore, should not be considered as against the proposed service, as the Postmasters of all offices involved are not opposed to CP service between Valdosta and Douglas.

(11) The recommendation to supersede RPO service by CP service between Douglas and Valdosta, is based upon the fact that the Railroad has shops at Douglas, Ga. and



maintain facilities for heating and cleaning of mail cars, also switch engine, 24 hours per day; however, the cars at present operated by the Railroad Company are heated by coal stove. Douglas, Ga. is also a junction of the A. B. & C. Railway. We do not have any information whether or not crews change at Douglas, but the schedule would indicate that they do, therefore, in view of these facts, we believe that Douglas is a division point where an RPO authorization can be terminated. Official Time Table of the Railroad Company shows a division at Douglas, Ga. and each freight train remains at Douglas as follows:—

	TRAIN 51	TRAIN 57	TRAIN 52	TRAIN 58
Ar. Douglas .....	8.45 PM	8.45 AM	9.00 AM	10.40 PM
Lv. Douglas .....	10.40 PM	11.45 AM	9.20 AM	10.50 PM

255 (12) It is not considered advisable to cover the whole line by Star Route Service on account of vigorous complaints and our investigation developed that it is not practicable to cover the service by Star Route, as the roads are not passable the year round, besides, do not cover the offices involved. There is a sufficient quantity of mail handled over the line to remain that will justify RPO service.

(13) Sunday service by CP trains 4 and 5 between Valdosta and Douglas, Ga. is not needed or desired, as the day's mail has already been received and Post Office closed before arrival of either train. The Postmasters at all offices are agreeable to the proposition. A small amount of work will be required in the Valdosta Post Office in making up pouches to be dispatched on Augusta & Madison CP train 4, which will be very little, however, as practically all of the mail for these offices is dispatched in the A.M., over Star Route 21271. No extra work will be required by the Post Office at Douglas, Ga. The following offices are involved:—

Office	Class	Salary or Con- vocations	Present Service	Proposed Service
Willacoochee, Ga.	3rd	\$1600	Exchange as follows:	Same as at present
PM agreeable			Ar. & Man 4 "A" 11.50am	except trains 4
Two Rural Routes			" " " 5 "A" 2.18pm	and 5 will be by
195 boxes			Waycross & Albany	CP service, daily
			Tr. 17 "B" 5.39 PM	except Sunday
			18 "A" 11.18 AM	
			24 "B" 11.38 PM	
			25 "A" 3.33 PM	
Nashville, Ga.	3rd	\$2300	Star Route 21271	do
PM agreeable			Ar. 6.20 AM outward	
Four Rural Routes			Ar. 5.40 PM inward	
245 boxes			Augusta & Madison	
			Tr. 4 "A" 11.16 AM	
			Tr. 5 "A" 2.52 PM	

Office	Class	Salary or Compensation	Present Service	Proposed Service
Ray City, Ga.	3rd	\$1500	STAR ROUTE 21271	do
PM agreeable			Ar 8:00 AM—outward	
Rural Route			Ar 5:45 PM—Inward	
289 boxes			AUGUSTA & MADISON	
			Tr 4 "A" 10:56 AM	
			Tr 5 "B" 3:11 PM	
Barretts, Ga.	4th	Not available	AUGUSTA & MADISON	do
PM agreeable	able		Tr 4 "B" 10:46 AM	
			Tr 5 "B" 3:21 PM	
			STAR ROUTE 21271	
			Ar 7:45 PM—outward	
			Ar 6:00 PM—Inward	

256 (14) The following pouches will be handled in Augusta & Madison CP Trs 4 and 5

Made by	Labelled to	Freq	Dispatched via
Valdosta, Ga.	Willacoochee, Ga.	B	Augusta & Madison CP 4
do	Nashville, Ga.	B	do
do	Ray City, Ga.	B	do
do	Barretts, Ga.	B	do
do	Aug & Mad RPO Tr 4	B	do
Willacoochee	do	B	do
Nashville	do	B	do
Ray City	do	B	do
Barretts	do	B	do
Aug & Mad RPO Tr 5	Barretts	B	Augusta & Madison CP 5
do	Ray City	B	do
do	Nashville	B	do
do	Willacoochee	B	do
do	Valdosta	B	do
do	Cin & Jack SD 1	B	do
do	Wacy & Montg RPO 180	B	do
Barretts	Valdosta, Ga.	B	do
Ray City	do	B	do
Nashville	do	B	do
Willacoochee	do	B	do

Any other pouches found to be necessary will be authorized and some of those enumerated may be found to be unnecessary and will be discontinued.

(15) It is recommended that the 15 ft. apartment car in Augusta & Madison RPO trains 4 and 5 be discontinued between Valdosta and Douglas, Ga., daily, and be superseded by 3 ft. CP service, daily except Sunday.

J. H. Bunn  
Chief Clerk, District 8

JHB:L  
Approved: Jun 21 1939

C. D. ADAMS  
Acting Superintendent

Form 1000  
Revised July 1933

# CLERICAL CHANGES—RAILWAY MAIL SERVICE 4th DIVISION

Changes in Augusta, Ga. & Madison, Ga. RPO

Effective

GENERAL SUPERINTENDENT, R. M. S., Washington, D. C.

The present and proposed status of above organization is as follows:

CLERICAL GRADES ALLOWED	OFFICIALS					CLERKS			STENO- GRAPHERS			LA- BORERS	TOTAL	ACTING CLERKS		
	12	11	10	9	8	CLASS B	CLASS A	Travel and allowance	4	3	2			Number of days Relief	Ad- ditional	Show date of last ap- proval for "Present" and date to which needed for "Proposed"
Present...							4						4	-	-	-
Proposed							3						3	-	-	-

Cost of service

Increase

Decrease

1. Clerks Gr. 5 and Clerks, Gr. 6-8		\$ 2450.00
Acting clerks Days		
Annual leaves		90.69
Travel allowance (explain increase)		273.75
Acting clerks' travel and DH expense		
Total	\$	\$ 2814.44
If examiner or assistant dictate by adding Ex.	Net	\$

STATE APPORTIONMENT

State	Miles	Percent	Authorized	On line
Ga.	160.20	100	3	3

## (1) RECOMMENDATIONS:

### CHANGES PROPOSED

Trains	Class	Crew Assignment	Outline of Changes	Hours of Duty Round Trips Per Annum			
				Present	Proposed	Present	Proposed
4, 5	A	Clerk in Charge	Curtailment of RPO Ser- vice, Douglas, Ga., superseded by CP service, Douglas to Valdosta, Ga., and return, daily except Sunday	5.28	5.24	91.25	121.66

(2) In accordance with your Joint Letter of September 8, 1937, in regard to minimum pay routes and mixed train service, recommendation on the Augusta & Madison RPO line is herewith submitted.



Form 5090

258 (6) The RPO service between Valdosta and Douglas, Ga. is not needed or justified as S. R. 21271 from Valdosta to Adel, Ga. and return, affords an adequate supply for Barretts, Nashville and Ray City. Willacoochee, Ga., the only other office between Valdosta and Douglas, Ga. is served by four RPO trains on the Waycross & Albany RPO —

Train 17, daily except Sunday; Train 18, daily

“ 94 “ “ “ “ “ 95 “

(7) The present service over the Augusta & Madison RPO costs as follows, per annum:—

Train 4, Valdosta to Augusta, 15 ft. Apt “A”..... 11,796.98

Train 5, Augusta to Valdosta, Ga. 15 ft. Apt “A”... 11,796.98

TOTAL COST OF RPO SERVICE.....\$23,593.96

(8) The proposed service over the Augusta & Madison RPO, Douglas to Augusta, Ga. and return, will cost as follows:—

Train 4, Valdosta to Douglas, 3 ft. CP unit “B”..... 883.12

Train 4, Douglas to Augusta, Ga. 15 ft. Apt “A” 8,478.58

Train 5, Augusta to Douglas, 15 ft. Apt “A”..... 8,478.58

Train 5, Douglas to Valdosta, 3 ft. CP “B”..... 883.12

TOTAL COST OF SERVICE PROPOSED.....\$18,723.40

TOTAL COST OF PRESENT SERVICE..... 23,593.96

TOTAL NET SAVINGS ON SPACE.....\$ 4,870.56 per annum

(9) Total net savings of \$4870.56 per annum effected by rearrangement of space. In addition, a savings of one grade 5 clerk, \$2450.00, with annual leave of \$90.69 and travel allowance, \$273.75 — making a total net saving of \$7685.00 per annum.

(10) Schedule maintained during the months of October, 1938 and April, '39.

Train 4—due 6.40 p.m.—Train 5 due 3.50 p.m.

OCTOBER 1938

APRIL 1939

Train 4	Train 5
1—6.55 p.m.	4.15 p.m.
2—7.00 p.m.	4.25 p.m.
3—6.40 p.m.	4.00 p.m.
4—8.30 p.m.	4.00 p.m.
5—9.00 p.m.	3.55 p.m.
6—8.50 p.m.	4.55 p.m.
7—8.05 p.m.	4.25 p.m.
8—7.25 p.m.	4.20 p.m.
9—6.55 p.m.	5.35 p.m.
10—6.40 p.m.	4.15 p.m.

Train 4	Train 5
1—7.55 p.m.	5.00 p.m.
2—7.00 p.m.	4.25 p.m.
3—6.50 p.m.	4.50 p.m.
4—6.55 p.m.	4.45 p.m.
5—7.30 p.m.	4.05 p.m.
6—7.55 p.m.	4.50 p.m.
7—7.30 p.m.	4.20 p.m.
8—7.55 p.m.	5.25 p.m.
9—6.40 p.m.	4.25 p.m.
10—6.40 p.m.	3.55 p.m.

Train 4 due 6.40 p.m. — Train 5 due 3.50 p.m.

## OCTOBER 1938

Train 4	Train 5
11—8.20 p.m.	4.55 p.m.
12—8.10 p.m.	3.50 p.m.
13—7.45 p.m.	5.05 p.m.
14—8.40 p.m.	4.30 p.m.
15—7.35 p.m.	4.50 p.m.
16—7.50 p.m.	4.30 p.m.
17—7.20 p.m.	3.50 p.m.
18—8.05 p.m.	5.05 p.m.
19—8.25 p.m.	4.20 p.m.
20—8.30 p.m.	4.15 p.m.
21—7.45 p.m.	4.20 p.m.
22—7.40 p.m.	4.50 p.m.
23—7.55 p.m.	5.38 p.m.
24—7.40 p.m.	5.05 p.m.
25—8.15 p.m.	4.40 p.m.
26—8.00 p.m.	4.30 p.m.
27—8.20 p.m.	4.50 p.m.
28—7.55 p.m.	4.25 p.m.
29—7.50 p.m.	4.15 p.m.
30—8.10 p.m.	6.10 p.m.
31—7.10 p.m.	4.17 p.m.

## APRIL 1939

Train 4	Train 5
7.10 p.m.	3.50 p.m.
7.05 p.m.	4.15 p.m.
6.45 p.m.	3.50 p.m.
7.45 p.m.	4.20 p.m.
6.55 p.m.	4.20 p.m.
6.40 p.m.	4.35 p.m.
6.40 p.m.	3.55 p.m.
6.40 p.m.	3.50 p.m.
6.40 p.m.	4.50 p.m.
7.20 p.m.	4.05 p.m.
6.55 p.m.	5.00 p.m.
7.20 p.m.	4.45 p.m.
6.50 p.m.	4.35 p.m.
6.40 p.m.	3.50 p.m.
7.00 p.m.	4.15 p.m.
6.50 p.m.	4.15 p.m.
7.00 p.m.	3.50 p.m.
7.30 p.m.	4.35 p.m.
7.20 p.m.	4.25 p.m.
6.40 p.m.	4.30 p.m.

(11) It is not believed that the loss of revenue from the RPO car superseded by CP service from Douglas to Valdosta would affect the finances of the Georgia & Florida Railroad or the operations of trains 4 and 5. This is a mixed train operated from Valdosta to Augusta and return with very little, if any, passenger travel, running very irregularly, *making regular schedule approximately three times per month*. We are submitting protest of the Railroad Company and petitions of protest of others, which are understood to have been instigated by the Railroad Officials. Last fall consideration was given to discontinuance of all RPO service to be superseded by Star Routes, which was the cause of the attached petition, therefore, should not be considered as against the proposed service as the Postmasters of all offices involved are not opposed by CP service between Valdosta and Douglas.

(12) The recommendation to supersede RPO service by CP service between Douglas and Valdosta, is based upon the fact that the Railroad has shops at Douglas, Ga. and maintains facilities for heating and cleaning of mail cars, also switch engine, 24 hours per day, however, the cars at present operated by the Railroad Company are heated by coal stove. Douglas, Ga. is also a junction of the A. B. & C.

Railway. We do not have any information whether or not crews change at Douglas, but the schedule would indicate that they do, therefore, in view of these facts, we believe that Douglas is a division point where an RPO authorization can be terminated. Official Time Table of the Railroad Company shows a division at Douglas, Ga. and each freight train remains at Douglas as follows:—

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	TRAIN 51	TRAIN 57	TRAIN 53	TRAIN 58
Ar. Douglas	8.45 P.M.	8.45 A.M.	9.00 A.M.	10.40 P.M.
Lv. Douglas	10.40 P.M.	11.45 A.M.	9.20 A.M.	10.50 P.M.

(13) It is not considered advisable to cover the whole line by Star Route Service on account of *vigorous complaints* and our investigation developed that it is not practicable to cover the service by Star Routes as the roads are not passable the year round, besides do not cover the offices involved. There is a sufficiently quantity of mail handled over the line to remain that will justify RPO service.

(14) Sunday service by CP trains 4 and 5 between Valdosta and Douglas, Ga. is not needed or desired, as the day's mail has already been received and Post Office closed before arrival of either train. The Postmasters at all offices are agreeable to the proposition. A small amount of work will be required in the Valdosta Post Office in making up pouches to be dispatched on Augusta & Madison CP train 4, which will be very little, however, as practically all of the mail for these offices is dispatched in the A. M., over Star Route 21271. No extra work will be required by the Post Office at Douglas, Ga. The following offices are involved:—

Office	Class	Salary or Compensation	Present Service	Proposed Service
Willacoochee, Ga. PM agreeable Two Rural Routes 195 boxes	3rd	\$1600.	Exchange as follows: Aug & Mad 4 "A" 11.50 AM " " " 5 "A" 2.18 PM WAYCROSS & ALBANY Tr 17 "B" 5.30 PM 18 "A" 11.18 AM 94 "B" 11.38 PM 95 "A" 3.33 PM	Same as at present except train 4 & 5 will be by CP service, Daily ex. Sun.
Nashville, Ga. PM agreeable Four Rural Routes 745 boxes	3rd	\$2300	STAR ROUTE 21271 Ar. 6.20 AM onward Ar. 5.30 PM — onward AUGUSTA & MADISON Tr 4 "A" 11.16 AM Tr 5 "A" 2.52 PM	Same as at present except no RPO service "B" at CP service "E" CP service will daily ex. Sun.



Office	Class of Car	Present Service	Proposed Service
Ray City, Ga. P.M. agreeable 1 Rural Route 280 boxes	3rd	\$1500 STAR ROUTE 21271 Ar 8:00 AM — outward Ar 5:45 PM — inward Augusta & Madison Tr 4 "A" 10:56 AM Tr 5 "B" 3:11 PM	Same as at present except no RPO service "B" — or CP service from Trs 4 and 5 "E"
Barretts, Ga. P.M. agreeable	4th	Not avail- able	Same as at present except no RPO service "B" — or CP service from Tr 4 and Tr 5 "E"
		AUGUSTA & MADISON Tr 4 "B" 10:46 AM Tr 5 "B" 3:21 PM STAR ROUTE 21271 Ar 7:45 AM — outward Ar 6:00 PM — inward	

(15) The following pouches will be handled in Augusta & Madison CP Trs 4 and 5

Made by	Labelled to	Freq	Dispatched via
Valdosta, Ga.	Willacoochee, Ga.	B	Augusta & Madison CP 4
do	Nashville, Ga.	B	do
do	Ray City, Ga.	B	do
do	Barretts, Ga.	B	do
do	Aug & Mad RPO Tr 4	B	do
Willacoochee	do	B	do
Nashville	do	B	do
Ray City	do	B	do
Barretts	do	B	do
Aug & Mad RPO Tr 5	Barretts	B	Augusta & Madison CP 5
do	Ray City	B	do
do	Nashville	B	do
do	Willacoochee	B	do
do	Valdosta	B	do
do	Cin & Jack SD 1	B	do
do	Waye & Montg RPO 180	B	do
Barretts	Valdosta, Ga.	B	do
Ray City	do	B	do
Nashville	do	B	do
Willacoochee	do	B	do

Any other pouches found to be necessary will be authorized and some of those enumerated may be found to be unnecessary and will be discontinued.

(16) The Augusta & Madison RPO is at present organized with four grade 5 clerks performing service four days on and four days off. However, under the proposed arrangement, there will be three grade 5 clerks performing service four days on, three days off and four days on, one day off. The discontinuance of RPO service in trains 4 and 5 between Valdosta and Douglas and return will dis-

pense with the needs of one grade 7 clerk on the Augusta & Madison RPO. However, the Junior Clerk has expressed a willingness to come to Atlanta for any assignment or vacancy out of Atlanta or accept a transfer to the Atlanta Terminal RPO.

(17) **CHANGE IN HEADQUARTERS**—Under the proposed arrangement, the headquarters of all clerks will be changed from Valdosta, Ga. to Douglas, Ga., but would be permitted to maintain their residence at Valdosta, Ga. and deadhead to and from Valdosta, on CP trains 4 and 5. The clerks remaining on this line would be R. E. Black, W. H. Moxley, and W. S. Ware. Clerk Black is the only one of these clerks who own his home at Valdosta, therefore, two of the three could move to Douglas, Ga. and eliminate any deadheading.

(18) **SURPLUS CLERKS**

Name	Grade	Residence	Home Ownership	Married	Dependent Children	Available Vacancies
John J. Thurmond	5	Valdosta, Ga.	No	Married	Four	Atlanta Terminal RPO

(19) **RECOMMENDATION**

We have had correspondence with all of the offices, Douglas to Valdosta, Ga. and since there is no objection to the proposed rearrangement of service and there will be a net saving of \$7685 per annum, it is recommended that the RPO service between Valdosta and Douglas and return, be superseded by CP service, daily, except Sunday; RPO Service, Douglas to Augusta, Ga. and return, daily, continue as at present, and one grade 5 clerk discontinued, surplusing Clerk John J. Thurmond, the junior clerk assigned to this line.

## REPORT OF R. P. O. INSPECTION

(REQUIRED)  
(SPECIAL)Inspection of Augusta & Madison  
on Friday May 19,  
(Day of week)R. P. O. Train 5  
between Augusta and Valdosta

70 (max)

A

936

## 1. MAIL DISTRIBUTED THIS TRIP

Chief Clerk reported at Car Between (See Note 3)	Miles traveled	Number of mail stops along route	Number of mail pieces		Pouches opened (Note 4)	Letters packed	Packets packed	Registers (pieces)	Number of clerks on duty	Total clerk hours	Average per hour	Total hours un- employed
			R	D								
Advance (6:40 A.M. to 7:40 A.M.)					3	10	10	0	1	1.00	46	None
Augusta to Hazlehurst	129	5	17	17	21	50	3	7	1	4.56	21	None
Hazlehurst to Valdosta	94	1	8	8	9	25	1	5	1	3.14	15	1 hr.
TOTAL FOR TRIP	223	6	25	25	33	85	14	12	3	9.10	23	1 hr.

## 2. DISTRIBUTION BY DAYS OF WEEK 4 weeks ending May 31, 1939

(See Note 4)

Day of Week	CLERICAL FORCE (From current Form 3317)					AVERAGE MAIL WORKED						UNWORKED MAIL (Explain under remark)		
	CREW		CLERK'S HOURS (Except unloading)			Pouches opened	Letters packed	Packets packed	Letters for mail	Total pieces packed	Average per clerk per hour	Number of letters	Pouches	Packets
	Through clerks	Helpers	Ad value	Ex route	Total									
Sunday	1	0	1.00	8.10	9.10	23	64	16	6	161	18			
Monday	1	0	"	"	"	30	73	12	4	171	19			
Tuesday	1	0	"	"	"	30	80	19	5	199	22			
Wednesday	1	0	"	"	"	31	84	20	10	211	23			
Thursday	1	0	"	"	"	33	87	22	12	225	25			
Friday	1	0	"	"	"	31	87	23	10	223	24			
Saturday	1	0	"	"	"	31	88	21	10	218	24			

NONE

## 3. SPACE USED IN AUTHORIZED DISTRIBUTING UNIT Frequency A

CAR No. 546

DIST. UNIT

STORAGE

DISTRIBUTION DEPARTMENTS USED AND NEEDED



5. **DISTRIBUTION PERFORMED THIS TRIP.** (If a State is made up No. 1, 2, etc., show each subdivision. If distribution of a State or city or long or short letters requires two or more cases, show each case, also indicate frequency required city distribution. Designate Accommodation distribution by "A." Distribution which can be deferred on basis of space needed, as "D." Explain excessive separations.)

[illegible]

6. Name of clerk in charge W.S. Ware Character of supervision One Man Run  
7. Are badges and revolvers worn on duty as required? Yes 8. Are necessary corrected schemes and schedules carried? Yes  
9. Commissions, condition of Good 10. Are registers handled according to regulations? Yes  
11. Are official diagrams followed? Yes Date of last approved diagram August 10, 1937  
12. Are errors checked and irregularities reported? Yes Number errors checked this trip 3  
13. Is any change in organization needed? Yes 14. Is any relief in force necessary? Yes  
15. Can any economy in organization be effected? Yes The complementary train number is 4  
16. Is advance period sufficient or excessive? Sufficient Average unloading credit needed this trip? 5 min.  
17. State if working packages and sacks are large, small, or average. Packages small Sacks small  
18. Last previous complete inspection April 8, 1937 between Valdosta and Augusta  
19. Last previous partial inspection No record between —  
20. REMARKS: Conditions regular. No mails unworked or carried by. All available  
mails loaded at all points. Sunday service necessary as service between Valdosta and  
Douglas will be closed pouch and will be distributed by RPO. See special report submitted  
with reorganization of this line. Force justified, Augusta, Ga. to Douglas, Ga. and  
return. Separations in line with quantity of mail distributed. Recommendation made  
for RPO service, Augusta to Douglas instead of Augusta to Valdosta, and closed pouch service  
Douglas to Valdosta.

A Clerk in Charge Curtailment of RPO Ser- 5.28  
 vice, Douglas, Ga.,  
 superseded by CP service,  
 Douglas to Valdosta, Ga.,  
 and return, daily except Sunday

5.24

91.25 121.66

(2) In accordance with your Joint Letter of September 8, 1937, in regard to minimum pay routes and mixed train service, recommendation on the Augusta & Madison RPO line is herewith submitted:

(3) The Augusta & Madison RPO is on the main line of the Georgia & Florida Railroad, consisting of Route 104781, Valdosta to Augusta, Ga., and return. Total mileage, 222.90 miles. The Space earnings of the 15 ft. RPO unit used on this line between Valdosta and Augusta, Ga. an return, is \$23593.96 per annum, for seven round trips per week. The apartment car accommodates all the mails handled on each trip.

(4) An inspection was made in train 4, May 18th, and train 5, May 19th. Copy of Inspection Report for both trains attached hereto. In train 4 leaving Valdosta there was only one pouch received, no storage mail nor sacks for distribution. There was only 10 pouches opened between Valdosta and Hazlehurst, there being 25 letter packages and one sack of papers for distribution, the major portion of which was received between Douglas and Hazlehurst, Ga. In train 5 from Hazlehurst to Valdosta there were only 9 pouches received and distribution was made of 25 letter packages and one sack, the major portion of which was received and handled between Hazlehurst and Douglas, Ga.

(5) It is proposed to discontinue RPO service between Valdosta and Douglas, Ga. to be superseded by closed pouch service. Consideration was given the matter of establishing a Star Route to supersede the RPO service between Douglas and Valdosta, Ga., but as there is no passable road to cover all offices involved, it was not considered feasible to have a Star Route between these points.

JHB:L

6-21-39

JUN 21 1939

(Approved)

193

193

*JHB*  
*W. B. Adams*  
 Acting Superintendent

(Approved)

(Initialed)

193

193

General Superintendent

Second Assistant



Form 5217  
Rev. April 1938

(See Note 1)

# REPORT OF R. P. O. INSPECTION

(REQUIRED)  
(SPECIAL)

Inspection of **Augusta & Madison**  
on **Thursday** **May 18,**  
(Day of week)

R. P. O. train **4** (Class **A**)  
between **Valdosta and Augusta, Ga.**

## MAIL DISTRIBUTED THIS TRIP

Agent Clerk reported at Car Between (See note 1)	Advance time fractions	Number of nonstop offices served	Number of local ex- changes		Pouches opened (Note 1)	Letters (packages)	Papers (stacks)	Registers (pieces)	Num- ber clerk on duty	Total clerk's hours	Per clerk per hour	Total hours employed
			H	D								
Advance (9.55 A. M. to 10.20 A. M.)					0	0	0	0	1	.25	0	0.00
Valdosta to Hazlehurst	94	1	8	8	10	25	1	1	1	3.07	16	1.00
Hazlehurst to Augusta	129	5	18	18	25	55	9	14	1	5.13	26	0.00
<b>TOTAL FOR TRIP</b>	<b>223</b>	<b>6</b>	<b>26</b>	<b>26</b>	<b>37</b>	<b>80</b>	<b>10</b>	<b>15</b>	<b>x x</b>	<b>8.45</b>	<b>22</b>	<b>1 hr.</b>

## DISTRIBUTION BY DAYS OF WEEK

4

weeks ending **May 31, 1939**

(See Note 4)

Day of Week	CLERICAL FORCE (From current Form 5217)					AVERAGE MAIL WORKED						UNWORKED MAIL (Explain under remarks)		
	CREW		CLERK'S HOURS (Except unloading)			Pouches opened	Letters (pkgs)	Papers (stacks)	Regis- ters (pieces)	Total accom- plishment	Average per clerk per hour (no fractions)	Num- ber times	LETTERS	
	Through clerk	Helpers	Ad- vance	From office	Total								Pouches	Pack- ages
Sunday	1	0	.25	8.20	8.45	14	42	5	3	87	10			
Monday	1	0	"	"	"	35	82	8	13	183	21			
Tuesday	1	0	"	"	"	36	84	10	14	193	22			
Wednesday	1	0	"	"	"	34	84	11	13	192	22	None		
Thursday	1	0	"	"	"	35	80	12	13	193	22			
Friday	1	0	"	"	"	35	85	15	12	206	24			
Saturday	1	0	"	"	"	35	75	11	8	182	21			

SPACE USED IN AUTHORIZED DISTRIBUTING UNIT Frequency **A**

CAR No. **546**

UNIT STORAGE

DISTRIBUTION SEPARATIONS USED AND NEEDED



5. DISTRIBUTION PERFORMED THIS TRIP. (If a State is made up No. 1, 2, etc., show each subdivision. If distribution of State or city—or long or short letters—requires two or more cases, show each case, also indicate frequency required city distribution. Designate accommodation distribution by "@" Distribution which can be deferred on basis of space needed, as "D". Explain excessive separations.)

State line or city	Pouches	Packages	Sep.	Sacks	Sep.	Registers	State line or city	Pouches	Packages	Sep.	Sacks	Sep.	Registers
Mixed	37		20	1									
Mixed		18	30										
Georgia		60	52	9	20								
S. Carolina		2	7										

421111  
111111  
vs.  
UNITED STATES  
DEFENDANT'S EX. NO. 7  
Draper Reporting Company

6. Name of clerk in charge **W.S. Ware** Character of supervision **One man run**  
 7. Are badges and revolvers worn on duty as required? **Yes** 8. Are necessary corrected schemes and schedules carried? **Yes**  
 9. Commissions, condition of **Good** 10. Are registers handled according to regulations? **Yes**  
 Are official diagrams followed? **Yes** Date of last approved diagram **August 10, 1937**  
 Are errors checked and irregularities reported? **Yes** Number errors checked this trip  
 13. Is any change in organization needed? **Yes, see recommendation** 14. Is any relief in force necessary? **No**  
 15. Can any economy in organization be effected? **Yes, see recommendation** The complementary train number is **5**  
 16. Is advance period sufficient or excessive? **Sufficient** Average unloading credit needed this trip? **5 min.**  
 17. State if working packages and sacks are large, small, or average. Packages **Small** Sacks **Small**  
 18. Last previous complete inspection **April 8, 1937** between **Valdosta and Augusta**  
 19. Last previous partial inspection **No record** between  
 20. REMARKS: **Conditions regular. No mails unworked or carried by. All available mails loaded at all points. Sunday service necessary as service between Valdosta and Douglas will be closed pouch and will be distributed by RPO. See special report submitted with reorganization of this line. Force justified between Douglas and Augusta. Separations in line with quantity of mail distributed. Recommendation made for RPO service between**

Tuesday	1	0	"	"	"	30	80	19	5	199	22
Wednesday	1	0	"	"	"	31	84	20	10	211	23
Thursday	1	0	"	"	"	33	87	22	12	225	25
Friday	1	0	"	"	"	31	87	23	10	223	24
Saturday	1	0	"	"	"	31	88	21	10	218	24

NON

111

3. SPACE USED IN AUTHORIZED DISTRIBUTING UNIT Frequency A CAR No. 546

LEAVING (See note 5)	DIST. UNIT		STORAGE			Stor age bags in car used per case made	DISTRIBUTION SEPARATIONS USED AND NEEDED													
	Furn.	Anth.	SPACE USED		Max avail space (Show how made)		LEAVE SEPARATIONS		BACK IN USE						TOTAL BACK IN SEPARATIONS					
			Work ing bags	Stor age bags			Used	Max avail needed per case made	Used		Back in Use		Boxes in use	Used			Max avail needed per case made			
									Num. Per case made	Per case made	Num. Per case made	Per case made		Num. Per case made	Per case made	Lat lers		Pa pers	Total	
Augusta	30	15	0	22	67	65	65	1	12					15	12	15	27	27		
Hazlehurst	30	15	0	20	65	55	55	1	12					12	16	8	24	24		

4. STORAGE UNITS AUTHORIZED THIS TRIP

Reg. Unit	Between	Reg. Unit	Between	Reg. Unit	Between
None					



\*Note.—Show sacks in vacant space, then show (per. 4) percentage used after adding bags in oversize car and deducting vacant space in authorized distributing unit. Show all return units authorized in train and whether paid for, thus—BY RMP (return movement, paid) or V DUN (disposal, no pay). No mail to be shown in oversize car until authorized distributing unit filled.

- A. Was proper attention given to the most economical use of distributing and storage space? **Yes**
- B. Can any economy in space be effected? **Yes, see recommendation**
- C. Was car congested so as to endanger safety of clerks or mail? **No** Any relief in space necessary? **No**
- D. If so, state under "Remarks" action taken **None** E. Are RMP units stated in most economical manner? **None**



19. Last previous partial inspection No record between           
20. REMARKS: Conditions regular. No mails unworked or carried by. All available  
mails loaded at all points. Sunday service necessary as service between Valdosta and  
Douglas will be closed pouch and will be distributed by RPO. See special report submitted  
with reorganization of this line. Force justified, Augusta, Ga. to Douglas, Ga. and  
return. Separations in line with quantity of mail distributed. Recommendation made  
for RPO service, Augusta to Douglas instead of Augusta to Valdosta, and closed pouch service  
Douglas to Valdosta.

6-20-39

(Date submitted)

W. C. Roney  
~~XXXXXXXXXX~~ Assistant Chief Clerk, Dist. No.         

JUN 22 1939

C. L. Adams  
(Signature of Superintendent)

**INSTRUCTIONS.**—1. A report on this form must be submitted for each complete inspection, each special inspection ordered, and for each distributing car in train. Erase either "Required" or "Special."

2. Special attention should be given to the routing of mails and to errors in distribution. The answer to question 12 should be based on the Chief Clerk's personal investigation on the trip.

3. Under section "1" make a separate entry for each portion of the line in which there is a material variation in the amount of distribution, and for a lay-over of 1 hour or more. Give data for two or more subdivisions according to length of the line except small "a" lines. Number of nonstop offices served should be included in number of local exchanges and pouches received combined under "Pouches opened."

The total for the trip on last line should correspond with the count on trip report. The data as to clerks hours, etc., is to be based on current Form 5084.

4. Under section "2" use data from Form 5210 for previous 4 weeks, except do not use December data and for inspections made in January use January data. If new organization, use 2, 3, or 4 weeks relating thereto.

5. Under section "3" list in column 1 the points at which the number of separations is materially increased or reduced and where authorization changes. Special attention should be given to diagrams of letter, pouch, and paper cars, and the elimination of unnecessary make-ups.

6. Submit a separate recommendation for any necessary change in space or organization incidental to the inspection.

7. Under heading, "20. Remarks" give any further information or data which should be considered, and state definitely whether or not you consider the clerical force in the train fully justified on every day of the week, and the necessity for Sunday service.

8. Under sections "1" and "2" the distribution will be converted into accomplishments on the following basis: Pouch opened (including registered) 2; letter package 1; paper sack 3; register one-half.



267

*Defendant's Exhibit No. 21**March 11, 1935. R.P.O. Train 5 between Augusta & Valdosta.*

- (16) REMARKS: Clerical force considered justified every day in the week. Unemployed time result of mixed train and slow schedule. Has connections for receipt and dispatch of mail at six intermediate junction points. Sunday service is necessary principally for supply of local offices having no other supply on that day.

*March 15, 1935. R.P.O. Train 1 between Valdosta & Augusta.*

- (16) REMARKS: Clerical force considered fully justified every day in the week. Slow schedule, but essential local service is performed with connections at five intermediate junction points for receipt and dispatch of mails. Sunday service not necessary in this train but is in the complementary train.

*April 7, 1937. R.P.O. Train 5 Between Augusta and Valdosta.*

- (16) REMARKS: Service with clerk is justified every day in the week, on account of local offices served and necessary dispatches of mail at six intermediate junction points. No congestion in mail car and no relief in space or force necessary.

*April 8, 1937. R.P.O. Train 1 between Valdosta and Augusta.*

- (16) REMARKS: Service with clerk justified every day in the week except Sunday. No saving is possible as space and clerk is necessary on that day in Train 5. No congestion in mail car and no relief in force or space necessary.

268

*Defendant's Exhibit No. 21*

C

O

P

Y

(pencil note)

JDH

The change from RPO to CP between Douglas and Valdosta is an economy proposition only and it is a question of Dept. policy as to whether the change should be approved.

WLM



18. Last previous complete inspection.....  
19. Last previous partial inspection..... No record..... between.....  
20. REMARKS: Conditions regular. No mails unworked or carried by. All available mails loaded at all points. Sunday service necessary as service between Valdosta and Douglas will be closed pouch and will be distributed by RPO. See special report submitted with reorganization of this line. Force justified between Douglas and Augusta. Separations in line with quantity of mail distributed. Recommendation made for RPO service between Douglas, Ga. and Augusta, Ga. and closed pouch service between Douglas and Valdosta, Ga.

June 20, 1939

(Date submitted)

*Frederick H. H. H. H.*  
Assistant Chief Clerk, Dist. No. 1

*C. S. Adams*  
(Signature of Superintendent)

**INSTRUCTIONS.**—1. A report on this form must be submitted for each complete inspection, each special inspection ordered, and for each distributing car in train. Erase either "Required" or "Special."

2. Special attention should be given to the routing of mails and to errors in distribution. The answer to question 12 should be based on the Chief Clerk's personal investigation on the trip.

3. Under section "1" make a separate entry for each portion of the line in which there is a material variation in the amount of distribution, and for a lay-over of 1 hour or more. Give data for two or more subdivisions according to length of the line except small "a" lines. Number of nonstop offices served should be included in number of local exchanges and pouches received combined under "Pouches opened."

The total for the trip on last line should correspond with the count on trip report. The data as to clerks hours, etc., is to be based on current Form 2084.

4. Under section "2" use data from Form 5219 for previous 4 weeks, except do not use December data and for inspections made in January use January data. If new organization, use 2, 3, or 4 weeks relating thereto.

5. Under section "3" list in column 1 the points at which the number of separations is materially increased or reduced and where authorization changes. Special attention should be given to diagrams of letter, pouch, and paper cases, and the elimination of unnecessary make-ups.

6. Submit a separate recommendation for any necessary change in space or organization incidental to the inspection.

7. Under heading, "20. Remarks" give any further information or data which should be considered, and state definitely whether or not you consider the clerical force in the train fully justified on every day of the week, and the necessity for Sunday service.

8. Under sections "1" and "2" the distribution will be converted into accomplishments on the following basis: Pouch opened (including registered) 2; letter package 1; paper sack 3; register one-half.



4 Div. also recommended 14.39 discount of CP Service on Trs 17 & 18 1948 Valdosta Ga & Madison Fla to be superseded by Star Rt Service.

(further pencilled notation).

Advise 4th that no action will be taken on this recommendation at this time

JDH

7/5

269

*Defendant's Exhibit No. 25*

COPY

Ry: H H-A  
July 5, 1939

The Superintendent R. M. S.  
Atlanta, Ga.

Careful consideration has been given your recommendation for the continuance of RPO service in the August & Madison RPO between Douglas and Valdosta, Ga.

While there is undoubtedly some merit in your recommendation, we feel that in view of the vigorous protest made in connection with proposed discontinuance of C.P. service between Valdosta, Ga., and Madison, Fla., this matter should be held in abeyance until such time as the railroad company might voluntarily withdraw or curtail some of this train service. Therefore, your recommendation of June 21 is not approved.

/s/ J. D. HARDY  
General Superintendent

270 *Order Settling and Approving Transcript of  
Record on Cross-Petition for Certiorari*

The plaintiff having presented to the court the within transcript from the original record of the court in the above-entitled case as a portion of the record material to the errors assigned in its application for record on cross-petition for certiorari; in addition to the portions of the record designated by the defendant, the court upon consideration thereof finds the transcript to be an accurate statement of such portions of the original record and that it is material to the errors assigned, and orders the same this third day of August, A. D. 1948, Settled and Approved.

BY THE COURT,  
SAMUEL E. WHITEKER,  
Acting Chief Justice.

271 In the Supreme Court of the United States  
October Term, 1948  
No. 135  
(Title Omitted)

*Stipulation as to be Printed Record*

Filed Aug. 31, 1948

It is hereby stipulated by and between counsel for the respective parties in the above entitled cause that, with the exception of Sheet 1, all of Defendant's Exhibit 3 be omitted from the printed record.

PHILIP B. PERLMAN,

PHILIP B. PERLMAN,  
*Solicitor General.*

MOULTRIE HITT,

MOULTRIE HITT,  
*Counsel for Respondents.*

Dated: August 31, 1948

273 In the Supreme Court of the United States  
October Term, 1948  
No. 198  
(Title Omitted)

*Stipulation as to Printed Record*

Filed Aug. 31, 1948

It is hereby stipulated between counsel for the respective parties that all of Defendant's Exhibit 23, consisting of copies of R.P.O. Inspection Reports, be omitted from the printed report with the exception of the following extracts therefrom:

*March 14, 1935: R.P.O. Train 5 between Augusta and Valdosta.*

(16) REMARKS: Clerical force considered justified every day in the week. Unemployed time result of mixed train and slow schedule. Has connections for receipt and dispatch of mail at six intermediate junction points. Sunday service is necessary principally for supply of local offices having no other supply on that day.

*March 15, 1935: R.P.O. Train 4 between Valdosta and Augusta.*

(16) REMARKS: Clerical force considered fully justified every day in the week. Slow schedule but essential local service is performed with connections at five intermediate junction points for receipt and dispatch of mails.

Sunday service not necessary in this train but is in the complementary train.

274 April 7, 1937. R.P.O. Train 3 between ~~Durham~~ and Valdosta.

(16) REMARKS: Service with clerk is justified every day in the week, on account of local offices served and necessary dispatches of mail at six intermediate junction points. No congestion in mail car and no relief in space or force necessary.

April 8, 1937. R.P.O. Train 4 between Valdosta and Augusta.

(16) REMARKS: Service with clerk justified every day in the week except Sunday. No saving is possible as space and clerk is necessary on that day in Train 5. No congestion in mail car and no relief in force or space necessary.

MOULTRIE HITT,

MOULTRIE HITT,

Attorney for Petitioner,

Alfred M. Jones, Receiver for

Georgia & Florida Railroad,

604 Tower Building,

Washington 5, D. C.

PHILIP B. PERLMAN,

PHILIP B. PERLMAN,

Solicitor General.

August 31, 1948.

## 276 SUPREME COURT OF THE UNITED STATES

No. . . . ., October Term, 1948.

WILLIAM V. GRIFFIN and HUGH WILLIAM PURVIS, Receivers  
for the GEORGIA AND FLORIDA RAILROAD, PETITIONERS.

v.

THE UNITED STATES.

*Order Extending Time Within Which to File Petition for  
Certiorari*

UPON CONSIDERATION of the application of counsel for the petitioners,

IT IS ORDERED that the time for filing a petition for certiorari in the above entitled cause be, and the same is hereby, extended to and including July 1st, 1948.

FRED M. VINSON,

Chief Justice of the United States.

Dated this 29th day of June, 1948.



## 277 SUPREME COURT OF THE UNITED STATES.

*No. 100,000, October Term, 1948.*ALFRED W. JONES, Receiver for Georgia and Florida  
RAILROAD, PETITIONER,

VS.

THE UNITED STATES.

*Order Extending Time to File Petition for Writ of  
Certiorari*UPON CONSIDERATION of the application of counsel  
for the petitioner,IT IS ORDERED that the time for filing petition for writ  
of certiorari in the above-entitled cause be, and the same is  
hereby, extended to and including August 11, 1948.

FRED M. VINSON,

*Chief Justice of the United States.*

Dated this 13th day of July, 1948.



[fol. 278] SUPREME COURT OF THE UNITED STATES, OCTOBER  
TERM, 1948

No. 135

THE UNITED STATES, Petitioner,

vs.

ALFRED W. JONES, Receiver for Georgia & Florida Railroad

ORDER ALLOWING CERTIORARI—Filed December 6, 1948

The petition herein for a writ of certiorari to the Court of Claims is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 279] SUPREME COURT OF THE UNITED STATES, OCTOBER  
TERM, 1948

No. 198

ALFRED W. JONES, Receiver for Georgia & Florida Railroad,  
Petitioner,

vs.

THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 6, 1948

The petition herein for a writ of certiorari to the Court of Claims is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



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CLERK

No. 135

In the Supreme Court of the United States

OCTOBER TERM, 1948

THE UNITED STATES, PETITIONER

WILLIAM V. GAYNE, FOR OTHER WILLIAM PERVIS,  
RESPONDENTS FOR GEORGIA & FLORIDA RAILROAD

PETITION FOR A WRIT OF HABEAS CORPUS TO THE COURT OF  
CLAIMS

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# In the Supreme Court of the United States

OCTOBER TERM, 1948

---

No. 135

THE UNITED STATES, PETITIONER

v.

WILLIAM V. GRIFFIN AND HUGH WILLIAM PURVIS,  
RECEIVERS FOR GEORGIA & FLORIDA RAILROAD

---

*PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF  
CLAIMS*

---

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled case on April 5, 1948.

## OPINION BELOW

The opinion of the Court of Claims (R. 36) is reported at 77 F. Supp. 197.

## JURISDICTION

The judgment of the Court of Claims was entered on April 5, 1948 (R. 50). The jurisdiction of this Court is invoked under the provisions of Section 3 (b) of the Act of February 13, 1925, as amended.

2

QUESTIONS PRESENTED

1. Whether the Court of Claims has jurisdiction to increase the rates of compensation fixed by the Interstate Commerce Commission under the Railway Mail Pay Act of July 28, 1916, which provides that the Commission, after notice and hearing, shall "fix and determine \* \* \* the fair and reasonable rates and compensation for the transportation of such mail matter."

2. Whether respondents have failed to exhaust their administrative remedy by bringing suit without requesting the Postmaster General to make a special contract for the transportation of the mails, as authorized by the Act, "where in his judgment the conditions warrant the application of higher rates" than those provided under the Act.

3. In the event there is jurisdiction in the Court of Claims, whether the scope of review permits the substitution of the court's judgment as to what constitutes fair and reasonable rates for that of the Interstate Commerce Commission.

4. Whether fair and reasonable rates and compensation for transporting mail must, as a matter of law, include compensation for the cost to the railroad of operating unusual amounts of unused space in cars carrying mail.

STATUTES INVOLVED

The relevant portions of the Railway Mail Pay Act (Act of July 28, 1916, 39 Stat. 412 *et seq.*, 39

In the event the petition for a writ of certiorari is granted, the Government will also urge that that portion of respond-



U. S. C. 523 *et seq.*) and other pertinent statutory provisions are set forth in the Appendix, pp. 33-38.

#### STATEMENT

This action was instituted by respondent railroad receivers in the Court of Claims to recover compensation for transportation of the United States mails at rates in excess of those fixed by the Interstate Commerce Commission pursuant to the Railway Mail Pay Act (R. 1, 10, 12). The period involved in this action is from April 1, 1931, through February 28, 1938 (R. 12). Since 1929 respondents, as receivers appointed by the United States District Court for the Southern District of Georgia, have operated the insolvent Georgia

ent's claim for the period before February 2, 1936, is barred by the statute of limitations. Respondents' original petition in the Court of Claims was filed February 2, 1942. Respondents' cause of action, if any, first matured either on May 10, 1933, when its application to the Interstate Commerce Commission for increased compensation was denied, or on October 3, 1933, when its petition for reconsideration was denied. Thereafter the United States District Court for the Southern District of Georgia entered an order setting aside the Commission's order and directing the Commission to take further appropriate action. Pursuant to this decree the Commission held further hearings and entered an order on February 4, 1936, adhering to its former rates. Subsequent proceedings before this Court established that the district court had no jurisdiction. *United States v. Griffin*, 303 U. S. 226. The question presented is whether the subsequent action of the Commission taken pursuant to the order of the district court, which was without jurisdiction, tolled the running of the statute of limitations.

& Florida Railroad Company, whose lines of railroad extend over 400 miles (R. 13).

Prior to the enactment of the "Railway Mail Pay Act," railroads, including the Georgia & Florida, transported mail at rates fixed under contract (R. 13). In 1916 Congress enacted, in the Railway Mail Pay Act, a comprehensive scheme of regulation of mail transportation by railroads which included detailed rate-fixing machinery. Under its terms, the Interstate Commerce Commission is "empowered and directed to fix and determine from time to time the fair and reasonable rates" at which carriers are required to transport the mails and a procedure is prescribed whereby rates are to be established only after notice and full hearing (39 U. S. C. 541, 542, 544-554). After six months from the entry of a rate order, either the Postmaster General or a carrier may apply to the Commission for a "reexamination" of the order (39 U. S. C. 553). The Postmaster General has the additional authority to make special contracts with carriers for transportation of mail at higher rates "where in his judgment the conditions warrant" (39 U. S. C. 565). The Act specifies five classes of service of which only two, apartment railway post-office car service and closed pouch service, are involved here (39 U. S. C. 531).

Following an elaborate investigation and after extended hearings, the Commission, on December

23, 1919, in its first general rate order under the Railway Mail Pay Act, adopted the space basis as the method for determining and promulgating rates. *Railway Mail Pay*, 56 I. C. C. 1. On July 10, 1928, the Commission increased the general rates previously fixed. *Railway Mail Pay*, 144 I. C. C. 675.

As of August 1, 1928, the Post Office Department delivered to the Georgia & Florida Railroad statutory authorizations for transporting the mail on regularly scheduled trains of the carrier at the rates prescribed in the Commission's order of July 10, 1928 (R. 21). Respondents accepted these rates without protest until April 1, 1931 when they applied to the Commission for a re-examination of the rates (R. 21). After investigation and hearing, the Commission, on May 10, 1933, denied the application for increased compensation, holding that the established rates were fair and reasonable (*Railway Mail Pay, In the Matter of the Application of Georgia & Florida Railroad for Increased Rates of Pay*, 192 I. C. C. 779; (R. 22-24)). A petition for reconsideration was denied by the Commission (R. 24). There is no showing that respondents ever applied to the Post Office Department for contract rates higher than those prescribed by the Commission (R. 94, 101, 131-135, 139).

In 1934, in a suit instituted in the United States District Court for the Southern District of Georgia under the Urgent Deficiencies Act (28



U. S. C. 41 (28)), a special three-judge court held the Commission's order unlawful and remanded the case to the Commission for further action (R. 25). Thereupon the Commission conducted further hearings, and, on February 4, 1936, again found the rates previously established to be fair and reasonable. (*Railway Mail Pay, In the Matter of the Application of Georgia & Florida Railroad for Increased Rates of Pay*, 214 I. C. C. 66; (R. 25)).

Upon a supplemental bill, the same three-judge court again held the Commission's order unlawful (R. 26). The Government appealed directly to this Court and the decree of the three-judge court was reversed on the grounds that the Commission's order was not reviewable under the Urgent Deficiencies Act because it was a "negative order," and that it was not the type of order comprehended in the Urgent Deficiencies Act because there was no wide public interest in the speedy determination of the validity of railway mail pay orders. *United States v. Griffin*, 303 U. S. 226. Following this Court's decision on February 28, 1938, respondents continued to carry mail at the rates fixed by the Commission and took no action before the Commission, the Post Office Department, or in the courts until the filing of the petition in this action four years later.

The mail service authorized for respondents consisted of a 15-foot apartment railway post-office car (R. P. O.) and 3-foot closed-pouch space (R. 26-27). The 15-foot R. P. O. apartment service called

for a 15-foot partitioned section of a 60-foot baggage car fitted with racks to enable a postal clerk employed by the Post Office Department to sort and reassemble the mail en-route (R. 26). The 3-foot closed-pouch service did not consist of any physically divided space in the baggage car, but permitted the transportation of from 50 to 56 mail pouches, the number which could be stored in a 3-foot section of the car (R. 27). The pouches were actually deposited any place in the car (R. 27). The number of pouches carried was normally less than 50, but the rate for this class of service was calculated and paid on the basis of the full 3-foot space unit, regardless of the number of pouches actually carried (R. 27).

Respondents claimed that the Commission's rates were not fair and reasonable as to them on the theory that they did not compensate them for the cost of transporting the mails plus a return of 5.75 per cent on the investment in road and equipment allocable to the mail service (R. 10, 21, 30). After respondents applied for reexamination of the mail rates, a test period of 28 days, for the purpose of obtaining space and other data, was selected (R. 21). This information was then analyzed in accordance with a cost allocation formula, referred to as Plan 2, which had been relied on heavily by the Commission in determining costs and rates in the first general mail pay order in 1919 (56 I. C. C. 1) and to a lesser extent in the 1928 (144 I. C. C. 675) and other proceedings. See 214 I. C. C. 66, 69-70. Invest-

ment in road and equipment was allocated in accordance with the cost ratio (R. 22). Respondents' claim to higher rates was based entirely on the results obtained by application of this formula (R. 4, 9-10).

Allocation of cost and investment in accordance with the proposed formula required the mail service to pay the expense and investment return for the operation of a substantial amount of empty space (R. 22). Costs were first apportioned between passenger train service and freight train service (R. 28). The amount thus apportioned to passenger train service was then further apportioned among passenger proper, baggage and express, and mail services in proportion to the space allocated to these services (R. 22, 30). Before the allocation was made, however, all unused space was charged to the services using space in accordance with the formula in Plan 2 (R. 22). In these computations space authorized for mail service was treated as space used although not actually used, whereas baggage and express service were charged only with space actually occupied (R. 22). There was considerable diversity of opinion as to the method of charging unused space to the mail service (R. 31-32). The Commission found that by allocating the data obtained in the study in accordance with Plan 2, mail rates would have to be increased 87.4 per cent to compensate respondents for the computed expense of providing the mail service and a 5.75 per cent return on investment (R. 23).



The Commission on two occasions held that fair and reasonable rates for respondents were not to be ascertained by a mechanical application of the cost formula in Plan 2. 192 I. C. C. 779; 214 I. C. C. 66. At the conclusion of the first hearing the Commission held that the cost study was "not considered to be an accurate ascertainment of the actual cost of the service" but only an approximation to be given appropriate weight considering all the circumstances, and adverted to various other factors which were deemed controlling. 192 I. C. C. 779. The Commission pointed out that "mail with relation to the other services is bearing its fair share of the expenses of operation and is contributing relatively more than the other services for the space furnished," and that it was paid for at the same rates paid other roads for the same kind of service (192 I. C. C. 779, 783; (R. 24)). In this report the Commission also pointed out that although passenger-train service, of which the mail service was a part, contributed only 5.86 per cent of total railway operating revenue, it was charged with 21.33 per cent of total railway operating expense. 192 I. C. C. 779, 782.

After the subsequent hearing, the Commission again adverted to various weaknesses in determining costs by the proposed formula both in general and particularly with respect to respondents' data, pointing out that costs determined in this fashion constituted but one of several factors ordinarily

considered by it in determining fair and reasonable rates. 214 I. C. C. 66. The Commission again emphasized that cost "computed in the manner" described is a hypothetical cost and not an actual cost" and pointed out that in other mail pay proceedings consideration had been given to "the amount and character of the unused space reported as operated," "the actual space occupied by mail, as distinguished from authorized space," "comparisons with compensation received from other services in passenger-train cars," and other factors. *Id.* at 69-70.

The Commission then turned to various factors in the instant case which it believed rendered the suggested formula unacceptable as an accurate guide to the ascertainment of costs. It pointed out that included in the unused space allocated to mail service was part of the excess space in a 30-foot R. P. O. apartment which was furnished at various times when a 15-foot apartment was authorized. 214 I. C. C. at 70; R. 25. The elimination of this excess unused space alone, which was furnished solely to serve the convenience of the carrier, might have resulted in a profit from the transportation of the mails even on respondents' theory of cost determination. 214 I. C. C. at 70-72. The total unused space allocated to the several passenger-train services constituted 44 per cent of the total space operated by respondents. 214 I. C. C. at 74. The Commission also found that "another element of doubt, as to the

reliability of the space study as a basis for determining the cost of service, arises from treating the 3-foot units of authorized mail space as the full space used by mail, regardless of the mail load carried." *Id.* at 73. In fact, according to the Commission's statistics, considerably less than half of the amount of space authorized appears to have been used. *Ibid.* In this connection the Commission also mentioned that the space furnished to meet authorizations for 3-foot units is not set aside for exclusive mail use but is merely available space in the same car used to carry baggage and express. *Ibid.* Further casting doubt on the cost analysis, the Commission noted that its computations did not take into account the fact that "expense of transporting mail per authorized car-foot mile, in view of the service rendered by applicant on its trains in connection with it, might reasonably be considered to be somewhat less per car-foot mile than for passenger-train service as a whole." *Id.* at 75-76.

The Commission also compared the revenue respondents received from the mail service with revenue received for other services and found they were receiving per car-foot mile approximately six times as much revenue from mail traffic as from passenger traffic and approximately two and one-half times as much revenue from mail traffic as from express traffic (*id.* at 74). It also computed the average expense per car-foot mile of operating the passenger-



train service and compared this figure with the revenue received for authorized mail space. The average computed expense per car-foot mile for passenger-train service as a whole was .66 cent. 214 I. C. C. at 74. The revenue per car-foot mile of authorized mail service was 1.03 cents, or 56 per cent more than the average computed expense. *Id.* at 74-75. Thus, "revenue per car-foot mile from the authorized space approaches quite closely the hypothetical cost per car-foot mile plus the stated return" for mail service. *Id.* at 75. This computation does not include, of course, any distribution of mail revenue to unused space apportioned to mail. *Ibid.*

The Commission concluded, "giving consideration to all the computations, the extent and cause of the operation of a substantial portion of the unused space, the fact that a theoretical cost and not actual cost is derived from the methods and plans adopted, and the small amount of mail carried in the authorized units of service \* \* \* that the present rates for transportation of the mail by the applicant are fair and reasonable" (214 I. C. C. at 76; (R: 25)).

In the court below the Government introduced evidence to prove that the authorizations to transport mail at the established rates advanced the financial interests of respondents and that these advantages were recognized by the railroad. In September 1937, the Post Office Department initiated a study to determine on what routes mail,

being carried on mixed freight and passenger trains, could be diverted to other mail or highway routes (R. 103, 104, 171). In June 1939, the Division Superintendent recommended discontinuance of the 15-foot apartment service on respondents' line between Douglas and Valdosta, Georgia, and the substitution of closed-pouch service, which would save the Department \$4,870.56 per year (R. 106, 177). Respondents strongly protested this proposed discontinuance of their 15-foot apartment service, stating (R. 170):

The loss of revenue for handling the mails would seriously affect the finances of the railroad and would undoubtedly curtail train service or eliminate passenger train service entirely; in fact I am not sure but that the loss of the mail revenue would result in abandonment of the railroad.

As a result of the protest against eliminating the financial benefit to the railroad, the Department determined not to discontinue the route until the railroad voluntarily curtailed its service (R. 192).

Between 1931 and 1938, every point of significance on respondents' mail routes was also served by another mail carrier, both by intersecting railroad lines connecting such points directly with Atlanta, Savannah, or Jacksonville, which are the three metropolitan centers for the region served by respondents, and by highway routes (R. 72-88). The mail service by other railroads serving the area covered by respondents' route

was available at the rates fixed by the Interstate Commerce Commission in its order of July 10, 1928, and petitioner offered to prove that the entire service furnished by respondents could have been adequately replaced at no increase in cost (R. 35-36, 83, 96-97).

The evidence also established that respondents' receipts from mail traffic constituted net additions to its revenue (R. 35, 113). The closed-pouch service did not require respondents to incur any appreciable or significant added cost, since this was furnished in cars which had to be hauled in any event (R. 35).—Likewise, the 15-foot apartment service did not entail any significant added cost, since it required the use of only one-quarter of the baggage car on the Augusta-Valdosta run, and that car could not have been cut out from the train even if no mail traffic had been carried (R. 113, 115-116). Moreover, even on the assumption that the R. P. O. apartment required the operation of an additional car, the revenue received for the R. P. O. apartment car service was four times the additional cost to the railroad for operating the car (R. 129). Elimination of mail authorizations to respondents, therefore, would have resulted in considerable financial loss to the railroad. Moreover, substituted mail service could have been obtained by the Government at no increase in cost (R. 35-36, 83).

The Court of Claims held that the Interstate Commerce Commission had failed to award re-



spondents an amount sufficient to compensate them for their costs and a return of 5.75 percent on investment in road and equipment engaged in mail service by refusing to apply the proposed cost apportionment formula and that in these circumstances, it had jurisdiction to render judgment for an amount sufficient to constitute fair and reasonable compensation under the facts as found by the Commission (R. 44, 48, 50). Relying on the Commission's finding that an increase of 87.4 percent of the rates paid would be necessary to compensate respondents for their costs and an adequate return on investment by a mathematical application of the cost allocation formula in Plan 2, the court below held as a matter of law that application of the formula was mandatory and awarded respondents \$186,707.06 as the amount necessary to render the mail rates fair and reasonable (R. 48, 50). In making this award, the court asserted that it was "giving effect to an order of the Interstate Commerce Commission as properly construed and not determining compensation in an original proceeding under the Fifth Amendment" (R. 49):

#### SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding in effect that under the Railway Mail Pay Act of 1916 it had, in the circumstances of the present case, jurisdiction to determine fair

and reasonable compensation for transporting the mails.

2. In holding that on the facts as found and stated by the Interstate Commerce Commission, there is an erroneous conclusion of law by the Commission that respondents have been fairly and reasonably compensated for their mail service.

3. In holding that the mail rate fixed by the Interstate Commerce Commission was confiscatory and did not fairly and reasonably compensate respondents.

4. In failing to hold that since the mail traffic bore, in addition to its direct costs, a fair share of the expenses of operation and contributed relatively more than the other services for the space furnished, the mail compensation fixed by the Commission was fair and reasonable.

5. In failing to hold that the statutory requirement that respondents carry all mail tendered is merely one phase of the general obligation imposed on common carriers to transport all traffic whether tendered by the Government or a private person.

6. In failing to hold that respondents actively sought to retain the mail traffic here involved, and that reasonably similar service could be obtained by the use of other railroads and trucks without increasing costs.

7. In entering judgment for respondents.

## REASONS FOR GRANTING THE WRIT

This case presents the question whether orders of the Interstate Commerce Commission fixing, after notice and hearing, the rates of compensation at which common carriers by rail shall carry the United States mails are reviewable in the Court of Claims at all, and, if so, the extent to which they are reviewable. This question has not heretofore been presented to this Court and should be resolved at this time because of the importance of settling the reviewability of railway mail pay rate orders. The rates fixed by the Commission are applicable to several hundred common carriers by rail that transport mail under the Railway Mail Pay Act and require the expenditure by the Post Office Department of, in excess of one hundred million dollars each year.

1. In 1938 this Court held, in connection with the same order that is involved in this action, that the Commission's mail rate orders were not reviewable under the Urgent Deficiencies Act. *United States v. Griffin*, 303 U. S. 226.<sup>2</sup> Notwithstanding con-

<sup>2</sup>The dual grounds for that decision were (1) that the order of the Commission was a "negative" order since it merely refused to increase the carrier's compensation fixed under a prior order, and (2) that there was no wide public interest in the speedy determination of the validity of railway mail pay orders which required the special procedures provided by the Urgent Deficiencies Act. Since railway mail pay orders determine the rates at which carriers are required to carry mail and which the Postmaster General is required to pay for its transportation (39 U. S. C. 551, 563), the "negative order" barrier to review under the Urgent



trary intimations in that opinion, an action in the Court of Claims for a money judgment does not appear to provide the appropriate mechanism for review in the complex field of rate regulation which Congress has committed to the recognized expertness of the Interstate Commerce Commission. The procedure provided by the Railway Mail Pay Act for notice and hearings (39 U. S. C. 547, 553, 554), together with the direction to the Commission "to fix and determine" fair and reasonable rates, imports a Congressional intention to place sole responsibility for determining railway mail pay rates on the Commission and not on the courts. See *United States v. New York Central*, 279 U. S. 73, 79; cf. *Shields v. Utah Idaho R. Co.*, 305 U. S. 177. The limited review, if any, which such a delegation may be deemed to contemplate (see *infra*, pp. 24-26), is

Deficiencies Act would seem to have been removed by the Court's later decision in *Rochester Telephone Corp. v. United States*, 307 U. S. 125. Although review was denied in the *Griffin* case on the additional ground of insufficient public interest, the Court may wish to reexamine the question of whether railway mail pay orders are sufficiently different in public importance from the host of rate and other orders which are reviewable under the Urgent Deficiencies Act. There is now pending before the Interstate Commerce Commission an application by more than 200 railway common carriers for the reexamination of the rates of pay for transportation of the mails. That proceeding is identical in character with the administrative proceeding involved in the present case. The broad scope of the order which of necessity must emanate from this general proceeding may well invite a reappraisal of the applicability of the special procedures of the Urgent Deficiencies Act.

not consistent with a proceeding in a court which can exercise no revisory power over the Commission and one in which the sole relief available is a money judgment.<sup>2</sup> Cf. *Shields case*, *supra*. Moreover, the substitution of the Court of Claims' judgment of a fair and reasonable rate for that fixed by the designated administrative agency, clashes with well-established concepts of the role of judicial review in the rate-making process. See, e. g., *New York v. United States*, 331 U. S. 284; *Federal Power Comm'n v. Hope Gas Co.*, 320 U. S. 591; *Federal Power Comm'n v. Natural Gas Pipeline Co.*, 315 U. S. 575. For, although it is "a part of judicial duty to restrain anything which, in the form of a regulation of rates" operates to deprive a carrier of a constitutional right, "the courts are not authorized to revise or change the body of rates imposed by a legislature or a commission." *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 397, 399; *West v. C. & P. Tel. Co.*, 295 U. S. 662; *Baltimore & Ohio R. Co. v. United States*, 298 U. S. 349; *Central Kentucky Co. v. Commission*, 290 U. S. 264.

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<sup>2</sup> Whether or not a railroad acts as a common carrier in transporting the mails (cf. *Atchison, T. & S. F. Ry. v. United States*, 225 U. S. 640, 649), the obligation to carry the mails for the Government does not differ substantially from the obligation of a common carrier to serve the public. Cf. 39 U. S. C. 543, 56 I. C. C. 1, 46-47. Since rate-making for mail pay purposes involves similar complexities and requires comparable expertness of the same nature as rate-making for other purposes, the administrative delegation by Congress would appear to invoke identical principles of review.

The principal basis for the assumption of jurisdiction by the Court of Claims appears to have been the language of this Court's opinion in *United States v. Griffin*, *supra*, suggesting various possibilities for review in appropriate circumstances.<sup>1</sup> Before the decision in the *Griffin* case, it was the settled rule in the Court of Claims that Congress had designated the Interstate Commerce Commission as the tribunal to fix mail rates and that the Court of Claims had "no jurisdiction \* \* \* to fix the compensation for the carry-

<sup>1</sup> *Fourth*.—The absence in the Railway Mail Pay Act of a provision for judicial review and the denial of jurisdiction under the Urgent Deficiencies Act do not preclude every character of judicial review. If the Commission makes the appropriate finding of reasonable compensation but fails, because of an alleged error of law, to order payment of the full amount which the railroad believes is payable under the finding, the Court of Claims has jurisdiction of an action for the balance, as the claim asserted is one founded upon a law of Congress. *Missouri Pacific R. Co. v. United States*, 271 U. S. 603. Compare *United States v. New York Central R. Co.*, 279 U. S. 73, affirming 65 Cl. Cl. 115, 121. And since railway mail service is compulsory, the Court of Claims would, under the general provisions of the Tucker Act, have jurisdiction also of an action for additional compensation if an order is confiscatory. *United States v. Great Falls Mfg. Co.*, 112 U. S. 645; *North American Transportation & Trading Co. v. United States*, 253 U. S. 330, 333; *Jacobs v. United States*, 290 U. S. 13, 16. Moreover, as district courts have jurisdiction of every suit at law or in equity arising under the postal laws, 28 U. S. C., § 41 (6), suit would lie under their general jurisdiction if the Commission is alleged to have acted in excess of its authority, or otherwise illegally. Compare *Powell v. United States*, 300 U. S. 276, 288, 289. \* \* \* 293 U. S. at 238.

ing of the mails." *New Jersey & New York R. R. Co. v. United States*, 80 C. Cls. 243, 248; *Pere Marquette Railway Co. v. United States*, 59 C. Cls. 538, 545; cf. *Denver & Rio Grande R. R. Co. v. United States*, 50 C. Cls. 382. In the *Griffin* opinion, the Court referred, without disapproval, to two of these decisions. 303 U. S. at 238. We submit that the various possibilities for review suggested in the *Griffin* case do not warrant the abandonment of this rule.

Neither of the grounds advanced for jurisdiction of the Court of Claims in mail pay cases is applicable here. An action which assails the rates fixed by the Commission as not fair and reasonable is obviously not one in which "the Commission makes the appropriate finding of reasonable compensation but fails, because of an alleged error of law, to order payment of the full amount which the railroad believes is payable under the finding." The language used by the court refers to a situation in which the carrier's claim, based upon the rates fixed by the Commission, was not paid because of an error of law. It cannot fairly be construed to authorize an attack on the rates themselves. This interpretation is confirmed by the supporting cases cited in the opinion. Neither *Missouri Pacific Railway Co. v. United States*, 271 U. S. 603, nor *United States v. New York Central*, 279 U. S. 73, involved attacks on the rates fixed by the Commission. On the contrary,



they assumed the correctness of the rates fixed and merely raised the question of their applicability to particular situations.

Similarly, this is not a case where "the Court of Claims would, under the general provisions of the Tucker Act, have jurisdiction \* \* \* of an action for additional compensation if an order is confiscatory." *United States v. Griffin, supra*, at p. 238. The cases cited to the Court's statement (*United States v. Great Falls Mfg. Co.*, 112 U. S. 645; *North American Transportation & Trading Co. v. United States*, 253 U. S. 330, 333; *Jacobs v. United States*, 290 U. S. 13, 16) demonstrate that it had in mind the situation in which an order issued pursuant to the Commission's rate-making power constituted a taking of private property for public use. But here the question of a taking is not involved as the court below specifically held that it was "not determining compensation in an original proceeding under the Fifth Amendment"-but rather that it was "merely giving effect to an order of the Interstate Commerce Commission as properly construed" (R. 49).

The denial of review in the Court of Claims would not foreclose judicial review of railway mail pay orders. It was pointed out by this Court in *United States v. Griffin, supra*, at 238, that "as district courts have jurisdiction of every suit at law or in equity arising under the postal laws,"

28 U. S. C., § 41 (6), suit would lie under their general jurisdiction if the Commission is alleged to have acted in excess of its authority, or otherwise illegally." Compare *Shields v. Utah Idaho R. Co.*, 305 U. S. 177.

2. The court below, in accepting jurisdiction, also failed to follow the well established doctrine that administrative remedies must be exhausted before resort can be had to the courts. *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U. S. 752; *United States v. Ruzicka*, 329 U. S. 287, 290, 292, 294-295; *Macauley v. Waterman Steamship Corporation*, 327 U. S. 540; *Myers v. Bethlehem Corp.*, 303 U. S. 41, 50-51; *Utley v. St. Petersburg*, 292 U. S. 106; *Milheim v. Moffat Tunnel Dist.*, 262 U. S. 710, 723-724; *First National Bank v. Weld County*, 264 U. S. 450, 454-456; *Yakus v. United States*, 321 U. S. 414, 444-447.

The Railway Mail Pay Act, while primarily concerned with the fixing of rates of general application, also provides that "the Postmaster General is authorized to make special contracts with the railroad companies for the transportation of the mails where in his judgment the conditions warrant the application of higher rates" than those specified in the orders of the Commission. 39 U. S. C. 565.

Although respondents made an unsuccessful application to the Interstate Commerce Commission for reexamination as to them of the order fixing

rates (192 I. C. C. 779, 214 I. C. C. 66), there is no showing that application was ever made to the Postmaster General for a special contract for higher rates because of respondents' asserted higher than average mail service costs. The statutory provision for special contracts appears to have been designed for such special circumstances as respondents assert. Under established principles, respondents' failure to give the Postmaster General the opportunity provided by statute to correct alleged inadequate compensation because of special conditions would seem to deprive the courts of jurisdiction of their action.

3. Even if it be assumed that there is jurisdiction in the Court of Claims to review the determination of the Interstate Commerce Commission, the court failed to give appropriate scope to the informed judgment of the expert administrative agency to which Congress delegated the function of prescribing "fair and reasonable" rates for transporting mail. *New York v. United States*, 331 U. S. 284; *Gray v. Powell*, 314 U. S. 402; *National Labor Relations Board v. Hearst Publications*, 322 U. S. 111. Thus "Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow." *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 139-140. "If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result," the judicial inquiry is at an end.

*Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U. S. 575, 586.

With particular reference to the fixing of rates, this Court has stated that "as the ultimate determination whether or not rates are confiscatory ordinarily rests upon a variety of subordinate or primary findings of fact as to particular elements, such findings made by a legislative agency after hearing will not be disturbed save as in particular instances they are plainly shown to be overborne." *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 54.

The complexities involved in determining the proper proportion of the railroads' cost and investment to be allocated to carrying the mails (see *Railway Mail Pay*, 56 I. C. C. 1-120; 144 I. C. C. 675-727), confirms "the wisdom of the narrow scope within which Congress has confined judicial participation in the rate-making process." *Board of Trade of Kansas City v. United States*, 314 U. S. 534, 546. "The determination of transportation costs and their allocation among various types of traffic is not a mere mathematical exercise. Like other problems in cost accounting, it involves the exercise of judgment born of intimate knowledge of the particular activity and the making of adjustments and qualifications too subtle for the uninitiated." *New York v. United States*, 331 U. S. 284, 335. The effect to be given a cost study is peculiarly within the province of the Commission and if "the record affords a



4. The court below was clearly in error in holding that fair and reasonable rates must be determined by application of a particular formula which compelled compensation for abnormal amounts of unused space not devoted to transportation of the mails. Cf. *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U. S. 575, 586. The court's statement that it was not making its own determination of fair and reasonable rates but was merely correcting the Commission's error of law and applying the proper rule of law to the Commission's findings erroneously assumes that the Commission had adopted Plan 2 as the proper method of determining mail cost and investment (R. 43, 44, 49). But the Commission had clearly rejected Plan 2, because of the presence of other factors, as the basis for determining mail costs and reasonable rates.

In its first report on reexamination of respondents' mail rates in 1933, the Commission pointed out that the cost formula which it had used in fixing the original rates was not "an accurate ascertainment of the actual cost of service," but was merely "an approximation to be given such weight as seems proper in view of all the circumstances" (192 I. C. C. 779, 783).<sup>5</sup> Even prior to its order with respect to respondents' application, the Commission had clearly recognized that the results obtained

<sup>5</sup> It is not even clear that the rates fixed in the original general mail pay order were based on a mathematical translation of the cost formula. 56 I. C. C. 1.

under the cost allocation formula were more theoretical than actual in its general mail pay order of July 10, 1928 (144 I. C. C. 675). This report not only discussed the inadequacies of this method of cost determination (144 I. C. C. 675, 691-692) but clearly rejected it as a single criterion for determining compensation. Although application of the formula indicated a rate increase of 25 per cent (144 I. C. C. at 688), an increase of only 15 per cent was allowed. 144 I. C. C. at 695.

The rejection of the Plan 2 formula in the instant case was made crystal clear when the Commission pointed out, on the rehearing of the application for reexamination, that it had consistently in its mail pay proceedings (citing references) given consideration to factors other than the hypothetical cost obtained by application of the space-study method; such as the amount and character of a railroad's unused space; the actual space occupied by mail as distinguished from authorized space; comparisons of compensation received from mail service with compensation received from other services in passenger-train cars; comparisons with freight rates; comparisons of the computed cost of mail service and revenue with the computed cost of corresponding units in passenger-train service as a whole; and the character of the service performed in connection with transporting the mail. 214 I. C. C. at 69-70. The lower court's computation of rates on the Plan 2 formula was, therefore, not an application of the law to the findings of the

Commission. The Commission had found that the Plan 2 formula was inapplicable. Its use by the court below was simply an independent judgment that a particular formula properly measured fair and reasonable rates despite a contrary view expressed by the Commission.

Many of the factors referred to by the Commission as undermining the validity of the Plan 2 cost formula were present in the instant case. The cost figures were unfairly weighted against the mail traffic, for space in the baggage car was allocated to mail traffic on the basis of the total space authorized, although the mail traffic actually used considerably less than the authorized space. 192 I. C. C. 782, 783; 214 I. C. C. 66, 73. Excessive amounts of unused space also mitigated against complete dependence on the cost formula. Although a 15-foot apartment was authorized, respondents at times furnished a 30-foot apartment for their own convenience and a portion of the additional 15 feet of unused space was allocated to the mail traffic. Forty-four per cent of the total car space moved was unused and a substantial proportion of this unused space was allocated under the cost study method to the mail traffic. 214 I. C. C. 66-72. If no part of the extra 15 feet of the 30-foot apartment were allocated to mail traffic, the reduction in expense charged to the mail traffic would have resulted in a computed profit. 214 I. C. C. 66, 71.

The Commission further pointed out that, based on space units which included proportionate amounts of unused space, "the mail service pays considerably more for equivalent units of service than passenger proper, or express. \* \* \*

Upon a computed unit-of-service basis, the amount paid by the department for carrying mail was about two and one-half times as much as the amount received by applicant from carrying express and about six times as much as the amount received for passenger service proper". (214 I. C. C. 66, 74). Furthermore, comparison of the cost of operating the space actually authorized for mail, omitting allocated unused space, with the rate paid for this space, permitted a generous return on investment. 214 I. C. C. at 75. It is also significant that receipts from mail traffic—approximately \$250,000 for the period 1931-1938—constituted net additions to its revenue (R. 35, 116, 129). Neither the 15-foot apartment service nor the closed-pouch service furnished by respondents required them to incur any significant costs which they would not have incurred even if they had carried no mail whatever (R. 35, 116). In these circumstances, mechanical application of the cost allocation formula without regard to the invalidating factors, achieves a wholly arbitrary result."

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\* See the dissent of Commissioner Eastman from the 1928 general increase order which attacks the cost allocation formula adopted by the court below as unsatisfactory regardless of any special circumstances. 144 I. C. C. 675, 725-727.



For a recent discussion of the unreliability of cost allocation formulas see *United States v. Feltin & Co.*, 334 U. S. 624:

Under the lower court's decision, as previously indicated, the Government will be charged with paying double compensation for space which it does not use. Wholly apart from the question whether the Commission has the authority to disregard some or all of this authorized but unused space in fixing rates, it is clear that it is not legally permissible to increase the cost to the Government through the use of oversized equipment. The statute provides that "the Postmaster General may accept cars and apartments of greater length than those of the standards requested, but no compensation shall be allowed for such excess lengths." 39 U. S. C. 532. The legislative background indicates that the provision was intended to free the Government from additional costs imposed upon it through the use of oversized equipment. Senate Hearings on H. R. 10484, 64th Cong., 1st sess., p. 9; 51 Cong. Rec. 13405; H. Doc. 1155, 63d Cong., 2d sess., p. 100; Preliminary Report and Hearings of the Joint Committee on Postage on Second-Class Mail Matter and Compensation

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Tabulations made by the Office of Railway Mail Adjustments of the Post Office Department disclose that a total of 9,069,053 sixty-foot car miles of unused space were operated by mail-carrying railroads during the year 1946 as a result of the use of over-sized post-office cars and apartments. An additional 4,638,950 sixty-foot car miles of unused space were operated as a result of the use of oversized storage cars.


for the Transportation of Mail, January 24, 1913, to April 3, 1914, pp. 861-883. In addition, several decisions of this Court suggest that fair and reasonable rates are not required to include compensation for unused capacity which is not devoted to the service to the customer. *Covington & Lexington Turnpike Co. v. Sandford*, 164 U. S. 578, 596; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439; *Public Service Commission v. Utilities Co.*, 289 U. S. 130, 135; *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U. S. 575, 590; cf. *Atchison, T. & S. F. Ry. v. United States*, 225 U. S. 640. Whether or not it is permissible to include the cost of operating unused space in mail rates, it seems clear error for a reviewing court to make the inclusion of such cost mandatory.

#### CONCLUSION

The effect of the decision below is to render uncertain the status of the Interstate Commerce Commission's mail pay rate orders, the procedure for their review and the proper scope of review. For these reasons and because the decision of the court below appears clearly wrong, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,  
Solicitor General.

JULY 1948.



## APPENDIX

The following sections of Title 39 in the U. S. Code are sections of the so-called "Railway Mail Pay Act" (Act of July 28, 1916, 39 Stat. 412, 425-431):

§ 524. Conditions of railway service; adjustment of compensation.

The Postmaster General is authorized and directed to adjust the compensation to be paid to railroad companies for the transportation and handling of the mails and furnishing facilities and services in connection therewith upon the conditions and at the rates hereinafter provided.

§ 525. Classes of routes enumerated.

The Postmaster General may state railroad mail routes and authorize mail service thereon of the following four classes, namely: Full railway post-office car service, apartment railway post-office car service, storage-car service, and closed-pouch service.

§ 527. Apartment railway post-office car service.

Apartment railway post-office car mail service shall be service by apartments less than forty feet in length in cars constructed, fitted up, and maintained for the distribution of mails on trains. Two standard sizes of apartment railway post-office cars may be authorized and paid for,

namely, apartments fifteen feet and thirty feet in length, inside measurement, except as hereinafter provided.

\* \* \* \* \*

§ 530. Closed-pouch service.

Closed-pouch mail service shall be the transportation and handling by railroad employees of mails on trains on which full or apartment railway post-office cars are not authorized, except as hereinbefore provided. The authorizations for closed-pouch service shall be for units of seven feet and three feet in length, both sides of car.

§ 531. Rates of payment for classes of routes.

The rates of payment for the services authorized in accordance with sections 524-541, 542-568 of this title shall be as follows, namely:

\* \* \* \* \*

(b) *Apartment railway post-office car service.*

For apartment railway post-office car mail service at not exceeding 11 cents for each mile of service by a thirty-foot apartment car and 6 cents for each mile of service by a fifteen-foot apartment car.

\* \* \* \* \*

(d) *Closed-pouch service.*

For closed-pouch service, at not exceeding 11½ cents for each mile of service when a three-foot unit is authorized, and 3 cents for each mile of service when a seven-foot unit is authorized.

\* \* \* \* \*

§ 541. Transportation required in manner, under conditions, and with service prescribed by Postmaster General; compensation therefor.



All railway common carriers are hereby required to transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith.

§ 542. Interstate Commerce Commission to fix and determine rates and compensation.

The Interstate Commerce Commission is empowered and directed to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of such mail matter by railway common carriers and the service connected therewith, prescribing the method or methods by weight, or space, or both, or otherwise, for ascertaining such rate or compensation, and to publish the same, and orders so made and published shall continue in force until changed by the commission after due notice and hearing.

§ 543. Relation between the railroads as public-service corporations and the Government to be considered.

In fixing and determining the fair and reasonable rates for such service the commission shall consider the relation existing between the railroads as public-service corporations and the Government, and the nature of such service as distinguished, if there be a distinction, from the ordinary transportation business of the railroads.

§ 547. Notice by Interstate Commerce Commission to railroads; answer of railroads; hearings.

Thereupon the commission shall give notice of not less than thirty days to each carrier so required to transport mail and render service; and upon a day to be fixed by the commission, not later than thirty days after the expiration of the notice herein required, each of said carriers shall make answer and the commission shall proceed with the hearing as provided by law for other hearings between carriers and shippers or associations.

\* \* \*

§ 549. Classification of carriers by Interstate Commerce Commission.

For the purpose of determining and fixing rates or compensation hereunder the commission is authorized to make such classification of carriers as may be just and reasonable and, where just and equitable, fix general rates applicable to all carriers in the same classification.

\* \* \*

§ 553. Applications for reexaminations.

Either the Postmaster General or any such carrier may at any time after the lapse of six months from the entry of the order assailed apply for a reexamination, and thereupon substantially similar proceedings shall be had with respect to the rate or rates for service covered by said application, provided said carrier or carriers have an interest therein.

§ 554. Powers conferred on Interstate Commerce Commission.

For the purposes of sections 524-541, 542-568 of this title the Interstate Commerce Commission is vested with all the powers which it is authorized by law to exercise in the investigation and ascertainment

of the justness and reasonableness of freight, passenger, and express rates to be paid by private shippers.

\* \* \* \* \*

§ 557. Information from Interstate Commerce Commission as to revenues from express companies; rates for transporting matter other than first class.

The Postmaster General shall, from time to time, request information from the Interstate Commerce Commission as to the revenue received by railroad companies from express companies for services rendered in the transportation of express matter, and may, in his discretion, arrange for the transportation of mail matter other than of the first class at rates not exceeding those so ascertained and reported to him, and it shall be the duty of the railroad companies to carry such mail matter at such rates fixed by the Postmaster General.

\* \* \* \* \*

§ 563. Refusal to perform service at rates or methods of compensation provided by law.

It shall be unlawful for any railroad company to refuse to perform mail service at the rates or methods of compensation provided by law when required by the Postmaster General so to do, and for such offense shall be fined \$1,000. Each day of refusal shall constitute a separate offense.

\* \* \* \* \*

§ 565. Special contracts for transportation; reports of.

The Postmaster General is authorized to make special contracts with the railroad companies for the transportation of the mails where in his judgment the conditions

warrant the application of higher rates than those specified in sections 524-541, 542-568 of this title.

The following provisions of Title 28, U. S. C., are also relevant:

§ 41. The district courts shall have original jurisdiction as follows:

(6) *Suits under postal laws.*

Sixth. Of all cases arising under the postal laws.

(28) *Setting aside order of Interstate Commerce Commission.*

Twenty-eighth. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

§ 46. (Judicial Code, section 208.) Suits to enjoin orders of Interstate Commerce Commission to be against United States.

Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the court, in its discretion, may restrain or suspend, in whole, or in part the operation of the commission's order pending the final hearing and determination of the suit.



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THE UNITED STATES, PETITIONER

ALFRED W. JONES, PETITIONER FOR GEORGIA & FLORIDA  
RAILROAD

ALFRED W. JONES, PETITIONER FOR GEORGIA & FLORIDA  
RAILROAD

ON PETITION OF PETITIONER FOR THE UNITED STATES

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# ***In the Supreme Court of the United States***

OCTOBER TERM, 1948

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No. 135

THE UNITED STATES, PETITIONER

v.

ALFRED W. JONES, RECEIVER FOR GEORGIA & FLORIDA  
RAILROAD

---

No. 198

ALFRED W. JONES, RECEIVER FOR GEORGIA & FLORIDA  
RAILROAD, PETITIONER

v.

THE UNITED STATES

---

*ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS*

---

BRIEF FOR THE UNITED STATES

---

OPINIONS BELOW

The report of the Interstate Commerce Commission, Division 5, appears at 192 I.C.C. 779; the later report of the Commission itself in this case appears at 214 I.C.C. 66. Both of these Commission reports are reprinted as Appendix B to

this brief, separately bound. The opinion of the Court of Claims (R. 36) is reported at 110 C. Cl. 330.

#### JURISDICTION

The judgment of the Court of Claims was entered on April 5, 1948 (R. 50). The petition in No. 135 was filed on July 1, 1948. The time for filing a petition in No. 198 was extended to August 14, 1948 (R. 195), and the petition was filed on August 5, 1948. Both petitions were granted on December 6, 1948 (R. 195). The jurisdiction of this Court rests upon 28 U.S.C. 1255.

#### QUESTIONS PRESENTED

1. Whether the Court of Claims has jurisdiction to increase the rates of compensation fixed by the Interstate Commerce Commission under the Railway Mail Pay Act of July 28, 1916, which provides that the Commission, after notice and hearing, shall "fix and determine \* \* \* the fair and reasonable rates and compensation for the transportation of such mail matter."

2. In the event there is jurisdiction in the Court of Claims, whether that court may substitute its judgment as to what constitutes fair and reasonable rates for that of the Interstate Commerce Commission.

3. Whether the Interstate Commerce Commission properly refused to increase the mail rates to be paid the plaintiff railroad on the ground that existing rates were fair and reasonable.

4. Whether the requirement of the Railway

Mail Pay Act that railway common carriers transport mail for "fair and reasonable compensation", as determined by the Interstate Commerce Commission, constitutes a taking of private property for public use within the meaning of the Fifth Amendment so as to entitle petitioner to recover interest from the United States, as an element of just compensation, for the delay in payment of fully compensatory rates.

5. Whether the portion of the railroad's claim for the period before February 2, 1936, is barred by the statute of limitations.

#### STATUTES INVOLVED

The provisions of the Railway Mail Pay Act (Act of July 28, 1916, 39 Stat. 412, *et seq.*, 39 U.S.C. 523, *et seq.*) are set forth in Appendix A, *infra*, pp. 86-103.

#### STATEMENT

A. *The background of this proceeding.*—This action was instituted by receivers for the railroad in the Court of Claims to recover compensation for transportation of the United States mails at rates in excess of those fixed by the Interstate Commerce Commission pursuant to the Railway Mail Pay Act (R: 1, 10, 12).<sup>1</sup> The period involved in this action is from April 1, 1931, through February 28, 1938 (R. 12). Since 1929, receivers,

<sup>1</sup> Alfred W. Jones, the present receiver, was substituted as respondent in No. 135 by order of this Court dated December 6, 1948. Because a petition and a cross-petition have been filed, the parties may sometimes be referred to by their capacity in the court below.

appointed by the United States District Court for the Southern District of Georgia; have operated the insolvent Georgia & Florida Railroad Company, whose lines of railroad extend over 400 miles (R. 13).

Prior to the enactment of the Railway Mail Pay Act, railroads, including the Georgia & Florida, transported mail at rates fixed under contract (R. 13). In 1916, Congress enacted, in the Railway Mail Pay Act, a comprehensive scheme of regulation of mail transportation by railroad common carriers which included detailed rate-fixing machinery. Under its terms, the Interstate Commerce Commission is "empowered and directed to fix and determine from time to time the fair and reasonable rates" at which carriers are required to transport the mails, and a procedure is prescribed whereby rates are to be established only after notice and full hearing (39 U. S. C. 541, 542, 544-554). After six months from the entry of a rate order, either the Postmaster General or a carrier may apply to the Commission for a "reexamination" of the order (39 U. S. C. 553). The Postmaster General has the additional authority to make special contracts with carriers for transportation of mail at higher rates "where in his judgment the conditions warrant" (39 U. S. C. 565). The Act specifies four classes of service of which only two, apartment railway post



office car service and closed pouch service, are involved here (39 U. S. C. 525-530).

Following an elaborate investigation and after extended hearings, the Commission, on December 23, 1919, in its first general rate order under the Railway Mail Pay Act, adopted the space basis as the method for determining and promulgating rates, and prescribed rates of compensation for authorized services to be applicable "on and after January 1, 1918." *Railway-Mail Pay*, 56 I.C.C. 1, 78. On July 10, 1928, the Commission increased the general rates previously fixed. *Railway Mail Pay*, 144 I.C.C. 675.

As of August 1, 1928, the Post Office Department delivered to the Georgia & Florida Railroad statutory authorizations for transporting the mail on regularly scheduled trains of the carrier at the rates prescribed in the Commission's order of July 10, 1928 (R. 21). The carrier accepted these rates without protest until April 1, 1931, when it applied to the Commission for a reexamination of the rates (R. 21). After investigation and hearing, the Commission, on May 10, 1933, denied the application for increased compensation, holding that the established rates were fair and reasonable. (*Railway Mail Pay, In the Matter of the Application of Georgia & Florida Railroad for Increased Rates of Pay*, 192 I.C.C. 779, Appendix B, pp. 1-9 (R. 22-24)). A petition for reconsideration was denied by the Commission (R. 24). There is no

showing that the railroad ever applied to the Post Office Department for contract rates higher than those prescribed by the Commission (R. 94, 101, 131-135, 139).

In a suit brought by the railroad in 1934, in the United States District Court for the Southern District of Georgia, under the Urgent Deficiencies Act (28 U.S.C. 41 (28)), a special three-judge court held the Commission's order unlawful and remanded the case to the Commission for further action (R. 25). Thereupon, the Commission conducted further hearings, and, on February 4, 1936, again found the rates previously established to be fair and reasonable (*Railway Mail Pay, In the Matter of the Application of Georgia & Florida Railroad for Increased Rates of Pay*, 214 I.C.C. 66, Appendix B, pp. 10-28. (R. 25)).

Upon a supplemental bill, the same three-judge court again held the Commission's order unlawful (R. 26). The Government appealed directly to this Court and the decree of the three-judge court was reversed on the grounds that the Commission's order was not reviewable under the Urgent Deficiencies Act because it was a "negative order," and that it was not the type of order comprehended in the Urgent Deficiencies Act because there was no wide public interest in the speedy determination of the validity of railway mail pay orders. *United States v. Griffin*, 303 U. S. 226. Following this Court's decision on Feb-

ruary 28, 1938, the railroad continued to carry mail at the rates fixed by the Commission and took no action before the Commission, the Post Office Department, or in the courts until the filing of the petition in this action four years later (R. 1, 58).

*B. The findings of the Interstate Commerce Commission.*—The reports of Division 5 and of the full commission disclose the factual basis of the orders (192 I.C.C. 779, 214 I.C.C. 66, Appendix B). The carrier's claim that the Commission rates were not fair and reasonable as to it is made on the theory that they did not provide compensation for its cost of transporting the mails plus a return of 5.75 per cent on its investment in road and equipment allocable to the mail service (R. 9-11). After it applied for reexamination of the mail rates, a test period of 28 days, for the purpose of obtaining space and other data, was selected (Appendix B, p. 2, R. 21). This information was then analyzed in accordance with a cost allocation formula, referred to as Plan 2, upon which some reliance had been placed by the Commission in determining costs and rates in the first general mail pay order in 1919 (56 I.C.C. 1) and to a lesser extent in the 1928 (144 I.C.C. 675) and other proceedings. Appendix B, pp. 16-17. The railroad's claim to higher rates was based entirely on the results obtained by application of this formula (R. 4, 9-10).

The mail service authorized for this railroad consisted of a 15-foot apartment railway post office car (R. P. O.) and 3-foot closed pouch space (Appendix B, p. 2, R. 26-27). The 15-foot R. P. O. apartment service called for a 15-foot partitioned section of a baggage car fitted with racks to enable a postal clerk employed by the Post Office Department to sort and reassemble the mail en route (R. 26). The 3-foot closed pouch service did not consist of any physically divided space in the baggage car, but permitted the transportation of from 50 to 56 mail pouches, the number which could be stored in a 3-foot section of the car (Appendix B, p. 23, R. 27). The pouches were actually deposited in any convenient space in the car (Appendix B, p. 23, R. 27). The number of pouches carried was normally less than 50, but the rate for this class of service was calculated and paid on the basis of the full 3-foot space unit, regardless of the number of pouches actually carried (Appendix B, pp. 22-23, R. 27).

In making the allocation of cost and investment under Plan 2, an apportionment was first made between passenger train service and freight train service in accordance with prescribed formulae (Appendix B, pp. 4; 11, R. 28).<sup>2</sup> The amount thus

<sup>2</sup> The Commission pointed out that although passenger train service, of which the mail service was a part, contributed only 5.86 per cent of total railway operating revenue, it was charged with 21 per cent of total railway operating expense. Appendix B, p. 6.



apportioned to passenger train service was then further apportioned among passenger proper, baggage and express, and mail services in proportion to the space allocated to these services (Appendix B, p. 3, R. 22, 30). Before the allocation was made, however, all unused space was charged to the services using space in accordance with the formula in Plan 2 (Appendix B, p. 3, R. 22). In these computations, space authorized for mail service was treated as space used although not actually used, whereas baggage and express service were charged only with space actually occupied (Appendix B, p. 3, R. 22). The Commission found that if costs and investment were allocated pursuant to Plan 2, the railroad's mail rates would have to be increased 87.4 per cent to compensate the railroad for the computed expense of providing the mail service and a 5.75 per cent return on investment (Appendix B, p. 5, R. 23).

But the Commission, first through Division 5 and then its full membership, held that fair and reasonable rates for the Georgia & Florida Railroad were not to be ascertained by a mechanical application of the cost formula in Plan 2. Appendix B, pp. 8, 16. At the conclusion of the first hearing, the Commission held that the cost study was "not considered to be an accurate ascertainment of the actual cost of the service" but only an approximation to be given appropriate weight considering all the circumstances, and adverted to

various other factors which were deemed controlling. Appendix B, pp. 8-9. The Commission found that "mail with relation to the other services is bearing its fair share of the expenses of operation and is contributing relatively more than the other services for the space furnished." Appendix B, p. 8, R. 24.

It noted, too, that "mail revenues have been relatively more stable than the revenues from the other passenger-train services," and that the actual use of the closed-pouch mail units was considerably below their maximum capacity. Appendix B, p. 6, R. 23. The Commission concluded in its first report, that in view of the above described considerations, and in view of the fact that the applicant receives the same rates as those received by other roads for the same kind of service, many of these other roads being in much the same situation as the applicant in respect of passenger-train operations, "the data submitted fail to justify giving the applicant rates higher than those now paid other railway common carriers for like services." Appendix B, p. 9, R. 24.

After the subsequent hearing, the full Commission again adverted to various weaknesses in determining costs by the proposed formula both in general and particularly with respect to the carrier's data, pointing out that costs determined in this fashion constituted but one of several factors ordinarily considered by it in determining fair and

reasonable rates. Appendix B, p. 10. The Commission again emphasized that cost "computed in the manner described is a hypothetical cost and not an actual cost", and pointed out that in other mail pay proceedings consideration had been given to "the amount and character of the unused space reported as operated," "the actual space occupied by mail, as distinguished from authorized space," "comparisons with compensation received from other services in passenger-train cars," and other factors. Appendix B, pp. 16-17.

The Commission then turned to various factors in the instant case which it believed rendered the suggested formula unacceptable as an accurate guide to the ascertainment of costs. It pointed out that included in the unused space allocated to mail service was part of the excess space in a 30-foot R. P. O. apartment which was furnished at various times when a 15-foot apartment was authorized. Appendix B, pp. 17-18. The elimination of this excess unused space alone, which was furnished solely to serve the convenience of the carrier, might have resulted in a profit from the transportation of the mails even on the railroad's theory of cost determination. Appendix B, pp. 17-20. The total unused space in combination cars allocated to "passenger, baggage, express and mail service constituted 44 per cent of the total space operated for these services. Appendix B, pp. 19-20.

The Commission also found that "another ele-

ment of doubt ~~as to the~~ reliability of the space study as a basis for determining the cost of service, arises from treating the 3-foot units of authorized mail space as the full space used by mail, regardless of the mail load carried." Appendix B, p. 22. In fact, according to the Commission's statistics, considerably less than half of the amount of space authorized appears to have been used. *Ibid.* In this connection, the Commission also mentioned that the space furnished to meet authorizations for 3-foot units is not set aside for exclusive mail use but is merely available space in the same car used to carry baggage and express. *Ibid.* Further casting doubt on the cost analysis, the Commission notes that its computations did not take into account the fact that "expense of transporting mail per authorized car-foot mile, in view of the service rendered by applicant on its trains in connection with it, might reasonably be considered to be somewhat less per car-foot mile than for passenger-train service as a whole." Appendix B, p. 27.

The Commission also compared the revenue respondents received from the mail service with revenue received for other services and found they were receiving per car-foot mile approximately six times as much revenue from mail traffic as from passenger traffic and approximately two and one-half times as much revenue from mail traffic as from express traffic. Appendix B, p. 24. It also computed the average expense per car-foot mile of



operating the passenger train service and compared this figure with the revenue received for authorized mail space. The average computed expense per car-foot mile for passenger train service as a whole was .66 cent. Appendix B, p. 25. The revenue per car-foot mile of authorized mail service was 1.03 cents, or 56 per cent more than the average computed expense. Appendix B, p. 25. Thus, "revenue per car-foot mile from the authorized space approaches quite closely the hypothetical cost per car-foot mile plus the stated return" for mail service. Appendix B, p. 26. This computation does not include, of course, any distribution of mail revenue to unused space apportioned to mail but does include the unused authorized space. *Ibid.*

The Commission again concluded, "giving consideration to all the computations, the extent and cause of the operation of a substantial portion of the unused space, the fact that a theoretical cost and not actual cost is derived from the methods and plans adopted, and the small amount of mail carried in the authorized units of service \* \* \* that the present rates for transportation of the mail by the applicant are fair and reasonable." Appendix B, pp. 27-28.

C. *The proceedings in the Court of Claims.*—In the court below, the Government introduced evidence to prove that the authorizations to transport mail at the established rates advanced the financial interests of the plaintiff and that these advantages

were recognized by the railroad. In September, 1937, the Post Office Department initiated a study to determine on what routes mail, being carried on mixed freight and passenger trains, could be diverted to other mail or highway routes (R. 103, 104, 171). In June, 1939, the Division Superintendent recommended discontinuance of the 15-foot apartment service on the plaintiff's line between Douglas and Valdosta, Georgia, and the substitution of closed pouch service, which would save the Department \$4,870.56 per year (R. 106; 177). The plaintiff strongly protested this proposed discontinuance of their 15-foot apartment service, stating (R. 170):

The loss of revenue for handling the mails would seriously affect the finances of the railroad and would undoubtedly curtail train service or eliminate passenger train service entirely; in fact I am not sure but that the loss of the mail revenue would result in abandonment of the railroad.

As a result of the protest against eliminating the financial benefit to the plaintiff, the Department determined not to discontinue the route until the railroad voluntarily curtailed its service (R. 192). At no time did the plaintiff ever ask to be relieved of the burden of carrying mail (R. 97).

The Government introduced evidence to prove that between 1931 and 1938, every point of significance on the Georgia & Florida's mail routes

was also served by another mail carrier, both by intersecting railroad lines connecting such points directly with Atlanta, Savannah, or Jacksonville, which are the three metropolitan centers for the region served by respondents, and by highway routes (R. 72-89). The Government offered to prove that the entire service involved in this action could have been adequately replaced at no increase in cost (R. 83, 96-97). The court below found that while the Georgia & Florida Railroad was the only railroad which could furnish R. P. O. apartment car service between the points for which such service was required of the plaintiff during the period here involved, the evidence showed that lines of certain other railroads crossed the line of the Georgia & Florida Railroad and discharged and received mail traffic at such points of passage (R. 35). The mail service by other railroads serving the area covered by the Georgia & Florida route was available at the rates fixed by the Interstate Commerce Commission in its order of July 10, 1928, which were the rates paid the plaintiff railroad (R. 35-36).

The evidence also established that plaintiff's receipts from mail traffic constituted net additions to its revenue (R. 35, 113). The closed pouch service did not require the railroad to incur any appreciable or significant added cost, since this was furnished in cars which had to be hauled in any event (R. 35). Likewise, the 15-foot apartment service did not

entail any significant added cost, since it required the use of only one-quarter of the baggage car on the Augusta-Valdosta run, and that car could not have been cut out from the train even if no mail traffic had been carried (R. 113, 115-116). Moreover, even on the assumption that the R. P. O. apartment required the operation of an additional car, the revenue received for the R. P. O. apartment car service was four times the additional cost to the railroad for operating the car (R. 129). Elimination of mail authorizations to the railroad, therefore, would have resulted in considerable financial loss to the railroad.

The Court of Claims held that the Interstate Commerce Commission had failed to award the carrier an amount sufficient to compensate for costs of operation and a return of 5.75 per cent on investment in road and equipment engaged in mail service by refusing to apply the proposed cost apportionment formula known as Plan 2, and that, in these circumstances, it had jurisdiction to render judgment for an amount sufficient to constitute fair and reasonable compensation under the facts as found by the Commission (R. 44, 48, 50). Relying on the Commission's finding that an increase of 87.4 per cent of the rates paid would be necessary to provide compensation for costs and an adequate return on investment by a mathematical application of the cost allocation formula in Plan 2, the court below held, as a matter of law, that the



application of the formula was mandatory and awarded judgment for \$186,707.06 as the amount necessary to render the mail pay fair and reasonable (R. 48, 50). In making this award, the court asserted that it was "giving effect to an order of the Interstate Commerce Commission as properly construed and not determining compensation in an original proceeding under the Fifth Amendment" (R. 49).

SPECIFICATION OF ERRORS TO BE URGED IN NO. 135

The court below erred:

1. In holding, in effect, that under the Railway Mail Pay Act of 1916, it had, in the circumstances of the present case, jurisdiction to determine fair and reasonable compensation for transporting the mails.

2. In holding that on the facts as found and stated by the Interstate Commerce Commission, there is an erroneous conclusion of law by the Commission that the railroad has been fairly and reasonably compensated for their mail service.

3. In holding that the mail rate fixed by the Interstate Commerce Commission was confiscatory and did not fairly and reasonably compensate the railroad.

4. In failing to hold that since the mail traffic bore, in addition to its direct costs, a fair share of the expense of operation and contributed rela-

tively more than the other services for the space furnished, the mail compensation fixed by the Commission was fair and reasonable.

5. In failing to hold that the statutory requirement that the railroad carry all mail tendered is merely one phase of the general obligation imposed on common carriers to transport all traffic whether tendered by the Government or a private person.

6. In failing to hold that the railroad actively sought to retain the mail traffic here involved, and that reasonably similar service could be obtained by the use of other railroads and trade without increasing costs.

7. In entering judgment for the railroad.

#### SUMMARY OF ARGUMENT

In *United States v. Griffin*, 303 U.S. 226, this Court held that the same orders of the Interstate Commerce Commission as are here involved were not reviewable under the Urgent Deficiencies Act. It is the Government's view that the railroad, in this case, mistook its remedy when it brought suit in the Court of Claims and that the Court of Claims erred in assuming jurisdiction over the railroad's claim and awarding judgment to it in an amount in excess of the compensation prescribed by the Commission. While the Government in this case, as in the *Griffin* case, is constrained to press its jurisdictional objections, it urges that even if the Court of Claims had jurisdiction (1) it disregarded the proper scope of a reviewing court's

function, and (2) the Commission's orders under review here are in any event correct. Acceptance by this Court of these views would make unnecessary decision of the jurisdictional question. Moreover, a decision on these questions in this case would resolve an important question relating to the scope of review, bring an end to the litigation and thus best serve the interests of the railroad, the Government, and the courts. While jurisdictional questions cannot normally be by-passed, such an approach would not be unprecedented. *Brooks v. Dewar*, 313 U. S. 354, 359-360; *Inland Empire Council v. Millis*, 325 U. S. 697, 699-700.

## I

The Government believes that the Court of Claims would have jurisdiction to award compensation based on rates fixed by the Commission where payment on the basis of established rates has been improperly refused. However, the action of the Court of Claims in the instant case can not be characterized as giving effect to rates established by the Commission or to an order of the Commission. The Court of Claims is here attempting to set aside the rates fixed by the Commission, disregard the orders of the Commission specifically holding these rates to provide fair and reasonable compensation for the Georgia and Florida Railroad, and then establish its own unsound measure of compensation while purporting to rely upon standards of the Commission. In attempting to substitute its judgment as to fair

and reasonable compensation, and thus nullify the rates fixed by the Commission in accordance with the statute, the Court of Claims usurped the functions of the rate-making body selected by Congress.

The statutory provisions and their legislative background unequivocally demonstrate that, in the Railway Mail Pay Act, the Congress intended to set up a regulatory scheme for determining fair and reasonable rates of compensation for transporting mails as part of the Commission's normal function of regulating rates which common carriers by rail may charge shippers. It is settled law that in reviewing rate orders it is not the province of the courts to substitute their judgment of proper rates for that of the legislatively created administrative bodies. When a Commission's determination with respect to rates is deemed to offend constitutional or statutory limitations, the court may do no more than set aside the rate order, require the Commission to fix proper rates, and provide incidental relief. Since the jurisdiction of the Court of Claims is limited to the rendition of money judgments, its powers do not include the judicial functions ordinarily invoked in the review of rate orders. We therefore believe that the Court of Claims is not the proper forum for the review of railway mail pay rates fixed by the Interstate Commerce Commission.

The Court of Claims, however, correctly held the statutory requirement to transport the mails



not to be an eminent domain taking of private property. The jurisdiction of the Court of Claims cannot therefore be predicated upon a right asserted under the Constitution to have "just compensation" judicially determined. The duty to carry the mails was imposed by the statute which also provided a regulatory scheme for fixing fair and reasonable rates of compensation for the service. The requirement of transportation and the method prescribed for fixing rates were considered by Congress not to differ from the statutory duty imposed upon common carriers to provide services to private shippers upon reasonable request therefor and from the rate-making functions exercised by the Interstate Commerce Commission with respect to other rail transportation services. It no longer seems open to question that rate fixing in its usual sense is not eminent domain but merely a form of regulation. There is no reason, therefore, particularly in the light of the Railway Mail Pay Act's legislative history, for treating the regulation of the rates which the United States will be required to pay for rail transportation services any differently from the regulation of rates charged private shippers.

## II

Even if jurisdiction to review the mail transportation rate orders of the Commission be found to exist in the Court of Claims, that court never-

theless erred in failing to respect the governing standards for judicial review of the determinations of expert administrative bodies. Notwithstanding the complexities inherent in the regulation of rail transportation charges in general and in the application of cost allocation formulas in particular, the Court of Claims brushed aside the various factors deemed significant by the Commission and insisted upon the use of a single mechanical formula for determining costs attributable to mail transportation, investment in road and equipment, and the fair and reasonable compensation for the mail service. We believe this action constituted a clear intrusion into the area reserved by Congress for administrative expertise. Moreover, although under existing authorities eminent domain concepts appear to have no place in the field of rate-making, the scope of judicial review would not be enlarged if the Court should find that the regulatory scheme constituted a taking under eminent domain. Rate regulation in the past has been considered in terms of eminent domain but the role of the courts in reviewing administrative action was not enlarged by the invocation of that doctrine. However the power exercised be described, the administrative judgment should be respected unless it plainly appears to be without rational support.

## III

In the instant case, whatever the scope of review, the Commission decision was correct and should have been left undisturbed. The Commission's refusal to adhere slavishly, without regard for other factors, to the results obtained by the application of a particular cost formula is hardly a proper cause for judicial condemnation. Moreover, in giving but limited weight to the cost formula, the Commission relied upon a variety of factors which have received Congressional and judicial approval, such as a comparison of rates with those charged other shippers for comparable services, and the fact that the railroad operated an excessive amount of unused space the charges for a large portion of which the formula allocated to the mail service. On the railroad's theory and that of the court below, mail rates would have to be increased as the railroad's other business, already inadequate, declined further. Nothing in the Railway Mail Pay Act or the applicable judicial decisions requires the postal service thus to subsidize financially weak carriers.

## IV

Although we believe that the reasonableness of the Commission's determinations should be tested in accordance with customary rate-making principles, the railroad is entitled to no greater compensation if traditional standards of "just com-

pensation" in classical eminent domain situations are applied. The owner of the property taken is normally entitled to receive only the market value at the time of the taking. In the instant case, equivalent space for comparable services was sold for less than the charge for the mail space. Other railroads in the same area were more than willing to transport mail at the prescribed rates. Thus the market value would seem to be established at no more than what was actually paid. Even if we assume that plaintiff's costs exceeded this market value, this fact would not be significant. The Fifth Amendment protects only the value of the property taken. It does not guarantee the owner the repayment of his costs or a return on his investment.

## V

The railroad's claim to interest on the increased compensation awarded by the court below, asserted in its cross-petition for certiorari, rests on its view that what was here involved was an eminent domain taking. We have demonstrated in point I that this case does not involve eminent domain. It follows that the railroad was not entitled to interest.

## VI

Even if the plaintiff railroad properly invoked the jurisdiction of the Court of Claims on February 2, 1942, its claim is barred by the applicable six year statute of limitations to the extent that it refers to the period prior to February 2, 1936.



## ARGUMENT

## I

**The Court of Claims Does Not Have Jurisdiction to Review an Order of the Interstate Commerce Commission Fixing Fair and Reasonable Rates for Transporting Mail**

In 1938 this Court held, in connection with the same orders that are involved in this action, that the Commission's orders fixing rates for transporting mail were not reviewable under the Urgent Deficiencies Act. *United States v. Griffin*, 303 U.S. 226.<sup>3</sup> The opinion suggested, however, that its decision did not preclude the possibility of other types of review. It was thought not only that a right existed to bring suit in the district courts, but also that the Court of Claims had jurisdiction in suits to recover compensation (1) where an appropriate finding of reasonable compensation had been made by the Commission but an order of payment had been withheld because of an error of law, and (2)

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<sup>3</sup> The dual grounds for that decision were (1) that the order of the Commission was a "negative" order since it merely refused to increase the carrier's compensation fixed under a prior order, and (2) that there was no wide public interest in the speedy determination of the validity of railway mail pay orders which required the special procedures provided by the Urgent Deficiencies Act. Since railway mail pay orders determine the rates at which carriers are required to carry mail and which the Postmaster General is required to pay for its transportation (39 U.S.C. 551, 563), the negative order barrier to review under the Urgent Deficiencies Act would seem to have been removed by the Court's later decision in *Rochester Telephone Corp. v. United States*, 307 U.S. 125. That decision leaves unaffected, however, the further ground of the absence of a public interest in speedy determination.

where the Commission's order was confiscatory. In this case, as we shall show in Subsection A, *infra*, pp. 28-30, the action of the Court of Claims cannot be brought within its legitimate jurisdiction to award reasonable compensation as found by the Commission but withheld because of an error of law. Although it is possible to construe the opinion of the Court of Claims as awarding additional compensation because of its view that the order of the Commission was confiscatory, we shall show in Subsections B, C, and D, *infra*, pp. 30-49 that the assumption of jurisdiction on this theory would be inconsistent with the legislative purpose to enact a regulatory scheme with the Interstate Commerce

<sup>4</sup>“Fourth.—The absence in the Railway Mail Pay Act of a provision for judicial review and the denial of jurisdiction under the Urgent Deficiencies Act do not preclude every character of judicial review. If the Commission makes the appropriate finding of reasonable compensation but fails, because of an alleged error of law, to order payment of the full amount which the railroad believes is payable under the finding, the Court of Claims has jurisdiction of an action for the balance, as the claim asserted is one founded upon a law of Congress. *Missouri Pacific R. Co. v. United States*, 271 U.S. 603. Compare *United States v. New York Central R. Co.*, 279 U.S. 73, affirming 65 Ct. Cl. 115, 121. And since railway mail service is compulsory, the Court of Claims would, under the general provisions of the Tucker Act, have jurisdiction also of an action for additional compensation if an order is confiscatory. *United States v. Great Falls Mfg. Co.*, 112 U.S. 645; *North American Transportation & Trading Co. v. United States*, 253 U.S. 330, 333; *Jacobs v. United States*, 290 U.S. 13, 16. Moreover, as district courts have jurisdiction of every suit at law or in equity arising under the postal laws, 28 U.S.C. § 41 (6), suit would lie under their general jurisdiction if the Commission is alleged to have acted in excess of its authority, or otherwise illegally. Compare *Powell v. United States*, 300 U.S. 276, 288, 289. \* \* \* 303 U.S. at 238.

Commission as the rate fixing agency (see *United States v. New York Central R. Co.*, 279 U.S. 73, 79) and with the traditional role of the courts in the rate-making process. Since we are of the further opinion that no other basis exists for the exercise of jurisdiction by the Court of Claims, we urge that it improperly entertained the instant suit.

We wish to suggest to the Court, in this connection, however, that in the light of the course these proceedings have taken during the past fifteen years and of the additional inconvenience and expense which will be suffered by the interested parties should the Government's view as to the lack of power of the court below be accepted, this may be an appropriate case in which the merits of the controversy should first be considered. When the railroad's attempt to obtain a review of the Commission's order under the Urgent Deficiencies Act was before this Court previously in the *Griffin* case (303 U.S. 226), although the Government felt constrained to present the arguments against jurisdiction under that Act, it stated its preference that the case be decided on the merits (Brief p. 17, note 4). Similarly, in this case, although we proceed, in this section, to discuss the jurisdictional obstacles to this suit, acceptance of the remainder of our argument, to the effect that properly confined judicial review of the Commission's orders must lead to a rejection of the railroad's claim, would make decision of the jurisdictional question

unnecessary. And if the railroad's claim is rejected on its merits, as we think it must be on any theory of judicial review, there will be no occasion, in this case, to reconsider paragraph Fourth of this Court's opinion in the *Griffin* case, respecting the tribunal in which the railroad may properly secure judicial review of the Commission's orders. Such a bypassing of jurisdictional questions, though unusual, is not without precedent. *Brooks v. Dewar*, 313 U.S. 354, 359-360; *Inland Empire Council v. Millis*, 325 U.S. 697, 699-700.

#### A. THE RAILROAD'S ACTION WAS NOT BASED ON AN ORDER OF THE COMMISSION

Admittedly, the Court of Claims would have jurisdiction of an action to recover compensation based upon rates fixed by the Commission which had not been paid because of an error of law. The court below apparently adopted this theory when it stated that "we are giving effect to an order of the Interstate Commerce Commission as properly construed and not determining compensation in an original proceeding under the Fifth Amendment" (R. 49). The plaintiff's petition in the Court of Claims and the court's opinion, however, constitute a direct assault on the rates established and reasserted by the Commission to be fair and reasonable for the services provided by the railroad. An action which assails the rates fixed by the Commission as not fair and reasonable is obviously not



one in which "the Commission makes the appropriate finding of reasonable compensation but fails, because of an alleged error of law, to order payment of the full amount which the railroad believes is payable under the finding." *Griffin* case, 303 U.S. at 238. This conclusion is confirmed by an analysis of the cases cited by the Court in support of the statement just quoted. Neither *Missouri Pacific Railway Co. v. United States*, 271 U. S. 603, nor *United States v. New York Central*, 279 U.S. 73, involved attacks on the rates fixed by the Commission. In the *Missouri Pacific* case, the only question was whether, as a matter of construction of the provision in the Railway Mail Pay Act directing payment to land-grant lines of only eighty per cent of compensation otherwise paid, the Commission properly applied that land grant provision not only to space actually used for the transportation of mail but also to that used for carrying mail distribution facilities. In the *New York Central* case, the only question was whether rates fixed by the Commission should be operative from the date of the Commission's order or from the date of the filing of the carrier's petition for increase. It is thus plain that the language from this Court's opinion in the *Griffin* case, above quoted, cannot fairly be construed to authorize an attack on the rates themselves.

The court's assertion that it was merely giving effect to an order of the Commission is obviously

rested upon its baseless assumption that the Commission had adopted so-called Plan 2 as a formula for determining mail transportation costs (R. 46). As pointed out *infra* p. 59, the results obtained from the use of Plan 2 were expressly rejected by the Commission as the sole and controlling factor in determining fair and reasonable railroad mail rates. In the instant case, the Commission regarded the cost allocation formula as particularly unreliable because of other supervening factors. In computing fair and reasonable compensation by a mathematical application of this formula alone, the Court of Claims clearly ignored the Commission's order establishing fair and reasonable rates. In so doing, it acted inconsistently with the provisions of the Railway Mail Pay Act, and beyond the proper scope of its jurisdiction.

#### B. CONGRESS CONTEMPLATED THE CUSTOMARY SCHEME OF RATE REGULATION

The intention of Congress to establish a traditional rate-making system with the customary limited judicial review is clear from the provisions of the statute. At the time of its enactment in 1916, the Railway Mail Pay Act prescribed "rates of payments for the services authorized" (39 U.S.C. 531) as an interim basis of compensation until other rates were fixed by the Interstate Commerce Commission. 53 Cong. Rec. 11228, 11243, 11246-11248. The same statute required the Com-

mission "as soon as practicable to fix and determine from time to time the fair and reasonable rates and compensation" for transporting mail, and to publish its determinations. 39 Stat. 429, 39 U.S.C. 542. This section also provided that "orders so made and published shall continue in force until changed by the Commission after due notice and hearing."

A detailed procedure was prescribed "for the ascertainment of said rates and compensation", 39 U.S.C. 544. The Postmaster General was required to file with the Commission a comprehensive plan for transporting mail by the railroads containing "what he believes to be the reasonable rate or compensation the said railway carriers should receive." 39 U.S.C. 546. Upon appropriate notice the carriers were required to answer and the Commission was directed to "proceed with the hearing as provided by law for other hearings between carriers and shippers or associations" 39 U.S.C. 547. "For the purpose of determining and fixing rates or compensation hereunder the commission is authorized to make such classification of carriers as may be just and reasonable and, where just and equitable, fix general rates applicable to all carriers in the same classification." 39 U.S.C. 549. The Commission was required, "at the conclusion of the hearing", to "establish by order a fair, reasonable rate or compensation to be received, at such stated times as may be named in the order, for the transporta-

tion of mail matter and the service connected therewith, and during the continuance of the order the Postmaster General shall pay the carrier . . . such rate or compensation." 39 U.S.C. 551. To carry out these functions, the Commission was "vested with all the powers which it is authorized by law to exercise in the investigation and ascertainment of the justness and reasonableness of freight, passenger, and express rates to be paid by private shippers." 39 U.S.C. 554.

The statutory provisions thus display an unmistakable purpose to adapt ordinary rate regulation techniques to the determination of rates of compensation to be paid carriers for transporting mail. Under the prescribed procedure, rates for units of service are established which are to remain effective until modified. This authority to fix rates or compensation for the future is obviously a rate-making function. *Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370.<sup>5</sup>

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<sup>5</sup> Congress, in the Railway Mail Pay Act, contemplated a regulatory scheme differing from that typically used in the case of private carriers and private shippers; only in that it insisted that the Commission consider the relation between "the railroads as public-service corporations and the Government, and the nature of such service as distinguished, *if there be a distinction*, from the ordinary transportation business of the railroads." 39 U.S.C. 543 (italics supplied). It is plain, from this provision, that Congress itself made no finding that railway mail pay was a field plainly different from ordinary railroad transportation; it left to the Commission the plenary and unfettered power to make a judgment as to any special regulatory provisions that it might deem appropriate. Congressional recognition of the relation involved as being between "public-service corporations and the Government" hardly



The statutory design to subject mail transportation charges to a regulatory scheme but little different from that in effect for carriers and other shippers is confirmed by its legislative history. The present provisions of the Railway Mail Pay Act which relate to the duty of common carriers to transport mail and to the determination of rates of compensation by the Interstate Commerce Commission originated in an amendment offered by Senator Cummins of Iowa and ultimately adopted, which establishes the present system of regulating railway mail service. 53 Cong. Rec. 9692. In discussing his proposed amendment, Senator Cummins made clear his purpose to have mail offered for transportation by the United States treated in much the same manner as other types of traffic offered by private shippers (53 Cong. Rec. 9697):

\* \* \* I think the railways of this country, by virtue of their organization and by the service which they proclaim, are bound to carry the mails if tendered by the Government, just as they are bound to carry passengers and freight when required by proper tender, and their compensation for the service ought not to be fixed by any contract; it ought to be fixed upon precisely the same basis as the compensation for every other service is fixed.

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suggests that the requirement that these corporations carry the mail constitutes an eminent domain taking; if anything, contrary inferences would be more justifiable.

He emphasized this concept at a later point when he stated (53 Cong. Rec. 9697):

\* \* \* The railway companies of this country are under no obligation to carry the mails other than the obligation which arises out of their function as common carriers, out of the power and authority of Congress to declare their railways post roads; and the Government of the United States can no more require a railway to carry the mails for less than adequate compensation than can Congress require the railways to render service to a private shipper for less than a fair and reasonable compensation. There is no other relation than that \* \* \*

He then indicated his view that the same method in use for regulating rates generally should be employed in determining mail transportation charges. "The carriers of this country are now being regulated along perfectly well-known lines," he explained. "Our experiment in controlling the rates of the railways of this country has advanced to a point where the rules which determine the adjustment are well known, however difficult they may be of application. I am not prepared to abandon the experiment. I believe it is successful—as successful as we find any other effort in dealing with a most complicated and difficult system." 53 Cong. Rec. 9697. He goes on to state that the tribunal which regularly fixes the rates paid for transporting commodities, "which must

ultimately say whether the rates on these articles are adequate or not, should also have the authority to say what the Government shall pay for the transportation of its mails." 53 Cong. Rec. 9698. "I do most earnestly insist that the same tribunal which fixes the rates for the great public shall fix the rates for that public organized in a Government." *Ibid.*

Senator Cummins stated that "my amendment puts the Government of the United States in the hands of the Interstate Commerce Commission, precisely as we put every citizen of the United States in the hands of that commission, and when the commission declares what is reasonable compensation it binds not only the railway companies but binds the United States as well, and that is thereafter the compensation to be paid for the service rendered." 53 Cong. Rec. 9694. "I think we ought to have the same confidence in the commission with respect to the service which we require as a Government that we compel the citizens of this country to have in the establishment of rates which they must pay." *Ibid.*

When questioned with respect to whether his amendment "provides for an appeal in this case as in other rate-making cases before the Interstate Commerce Commission," Senator Cummins responded that it "would permit the same review, although the present law does not permit an appeal." He continued to explain that "under the

present interstate-commerce law if the rates are confiscatory the railway companies can bring a suit for an injunction and in that way the validity of the order of the Interstate Commerce Commission is tested, but under the present law the shipper has no remedy whatever. The decision of the Interstate Commerce Commission as to the shipper is final. \* \* \* There would be the same remedy precisely under my amendment for the railway companies that now exists in the case of the establishment of a rate for a private shipper." 53 Cong. Rec. 9694.

It is clear that the sponsor of the regulatory provisions now contained in the Railway Mail Pay Act intended to extend, with necessary adaptations, the system of regulating railroad common carriers in effect with respect to private shippers to the mail shipments of the United States and to have the same considerations govern the duties of the carriers and the determination of fair and reasonable mail transportation rates. The Congressional purpose to make the regulation of rates for transporting mails but a part of the general regulation of common carriers by the Interstate Commerce Commission is thus apparent. This is confirmed by the provision in the Transportation Act of 1940 that "the rate determined by the Interstate Commerce Commission as reasonable therefor shall be paid for the transportation by railroad of the United States mail" 49 U.S.C. 65.



C. THE COURT OF CLAIMS HAS NO POWER TO FIX RATES UNDER THE RAILWAY MAIL PAY ACT OR TO ORDER REVISIONS OF THE COMMISSION'S RATE ORDERS

Congressional recognition that rate-making for mail purposes involves complexities and requires expertness of the same nature as rate-making for other purposes, together with the manifest purpose of Congress to establish a supplementary regulatory scheme for mail transportation of the same character as the existing scheme for other transportation, compels the conclusion that the Court of Claims was not granted the authority it assumed in this case.

An action in the Court of Claims for a money judgment, like that at bar, does not provide the appropriate mechanism for judicial review in the complex field of rate regulation which Congress has committed to the recognized expertness of the Interstate Commerce Commission. The procedure provided by the Railway Mail Pay Act for notice and hearings (39 U.S.C. 547, 553, 554), together with the direction to the Commission "to fix and determine" fair and reasonable rates, imports a Congressional purpose to place sole responsibility for determining railway mail pay rates on the Commission and not on the courts. See *United States v. New York Central*, 279 U. S. 73, 79; 46 *Shields v. Utah Idaho R. Co.*, 305 U. S. 177. Under such a statute, although it is a part of judicial

duty "to restrain anything which, in the form of a regulation of rates" operates to deprive a carrier of a constitutional right, "the courts are not authorized to revise or change the body of rates imposed by a legislature or a commission." *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 397, 399; *West v. C. & P. Tel. Co.*, 295 U. S. 662; *Baltimore & Ohio R. Co. v. United States*, 298 U. S. 349; *Central Kentucky Co. v. Commission*, 290 U. S. 264. As stated in Mr. Justice Black's concurring opinion in *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U. S. 575, 608, "the problem of rate-making is for the administrative experts, not the courts" and the functions of the courts "should be reduced to the barest minimum which is consistent with the statutory mandate for judicial review." The limited review which such a delegation as is made by the Railway Mail Pay Act may be deemed to contemplate (see *infra*, pp. 49-58) is not consistent with a proceeding in a court which can exercise no revisory power over the Commission and one in which the sole relief available is a money judgment. Cf. *Shields case, supra*.

The limited scope of the jurisdiction of the Court of Claims is not open to question. It has been "uniformly held, upon a review of the statutes creating the court and defining its authority, that its jurisdiction is confined to the rendition of money judgments in suits brought for that relief against the United States." *United States v.*

*Sherwood*, 312 U. S. 584, 588.<sup>6</sup> Thus, the Act of March 3, 1863, 12 Stat. 765, which first authorized the Court of Claims to give final judgments, was construed to preclude entertaining an action to compel the issuance of a military bounty land warrant. "Although it is true that the subject-matter over which jurisdiction is conferred, both in the act of 1855 and of 1863, would admit of a more extended cognizance of cases, yet it is quite clear that the limited power given to render a [money] judgment necessarily restrains the general terms, and confines the subject-matter to cases in which the petitioner sets up a moneyed demand as due from the government." *United States v. Alire*, 6 Wall. 573, 575-576. And in *Bonner v.*

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<sup>6</sup> The Court of Claims was first established by the Act of February 24, 1855, 10 Stat. 612, to hear and determine certain claims against the Government of the United States, and also all claims which might be referred to the court by either House of Congress. The court was to keep a record of its proceedings in each case and make a report to Congress for the action of that body. By the Act of March 3, 1863, 12 Stat. 765, the court was for the first time authorized to render final judgments. At the next session of Congress, this statute was amended because of this Court's decision in *Gordon v. United States*, 2 Wall. 561, restricting appeals from the Court of Claims. 14 Stat. 9. In 1887, the preceding acts were combined into the Tucker Act (24 Stat. 505), under which the Court of Claims was given jurisdiction to hear and determine "All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable \* \* \*".

*United States*, 9 Wall. 456, which also arose under the Act of 1863, the Court of Claims was held to be without jurisdiction to entertain a suit for a money judgment based upon an alleged breach of trust by the United States because the cause of action was equitable in nature.

Although the Tucker Act of March 3, 1887, 24 Stat. 505, broadly conferred jurisdiction upon the Court of Claims in cases not sounding in tort, "in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable," this Court ruled that "in the point of providing only for money decrees and money judgments, the law is unchanged, merely being so extended as to include claims for money arising out of equitable and maritime as well as legal demands." Had the intention of Congress been to go farther than this, "some provision would have been made for carrying into execution decrees for specific performance." *United States v. Jones*, 131 U. S. 1, 18; *District of Columbia v. Barnes*, 197 U. S. 146, 152. Thus the Court of Claims has exercised equitable jurisdiction where relief could be granted by the award of a money judgment (*Olympia Shipping Corp. v. United States*, 71 C. Cls. 251, 262; *United States v. Milliken Imprinting Co.*, 202 U. S. 168), but not otherwise. The Court of Claims has itself ruled that it has no power to grant petitioner the right of discovery



(*Blenkner v. United States*, 65 C. Cls. 18), to set aside a fraudulent conveyance of land (*Leather v. United States*, 64 C. Cls. 388); or to try title to office through the extraordinary remedy of certiorari, mandamus, or quo warranto (*Hart v. United States*, 91 C. Cls. 308). Jurisdiction under the Declaratory Judgment Act of June 14, 1934, 48 Stat. 955, was disclaimed on the ground that it contemplated "a proceeding equitable in nature and foreign to any jurisdiction the court has heretofore exercised." *Twin Cities Properties v. United States*, 81 C. Cls. 655, 658.

Since the jurisdiction of the Court of Claims is so confined, it is apparent that review of the actions of administrative tribunals, which, when properly exercised, does not extend to making awards on the basis of judicially revised standards but is limited to setting aside administrative orders and remanding for further proceedings if the initial order is found to be defective, must be considered outside the scope of a proceeding in that court. See *supra*, pp. 37-38. The Court of Claims has recognized that "The question of reasonableness of tariff rates and routes is one over which this court has no jurisdiction. It has been committed by Congress to the Interstate Commerce Commission." *Southern Railway Co. v. United States*, 100 C. Cls. 175, 197-198, affirmed on other grounds, 322 U. S. 72. And as to the Railway Mail Pay Act itself, before the decision in the *Griffin*

case, it was the well settled rule in the Court of Claims that Congress had designated the Interstate Commerce Commission as the tribunal to fix mail rates and that the Court of Claims had "no jurisdiction \* \* \* to fix the compensation for the carrying of the mails." *New Jersey & New York R. R. Co. v. United States*, 80 C. Cls. 243, 248; *Pere Marquette Railway Co. v. United States*, 50 C. Cls. 338, 345; cf. *Denver & Rio Grande R. R. Co. v. United States*, 50 C. Cls. 382. In the *Griffin* opinion, the court referred, without disapproval, to two of these decisions, 303 U. S. at 248. We submit that the possibilities for review suggested in the *Griffin* case do not warrant the abandonment of this rule.

#### D. THE JURISDICTION OF THE COURT OF CLAIMS CANNOT BE PREDICATED ON A THEORY OF EMINENT DOMAIN

The railroad has attempted to sustain the jurisdiction of the Court of Claims on the theory that it is authorized to determine "just compensation" in eminent domain cases and that the statutory duty imposed upon common carriers to transport mail gave rise to a taking of the railroad's property under the Fifth Amendment, Pet. in No. 198, pp. 8-10. The court below rejected this theory of the railroad's claim and we believe properly so. There is no showing that the railroad was required to remain in operation, that it was required to run

any trains specially for the mail service, or that it was required to add any cars to regularly scheduled trains to transport the mails. On the contrary, the evidence points to the fact that it was not required to assume additional burdens and that authorizations to carry mail were continued to aid the railroad's precarious financial condition (R. 94, 97, 100, 113, 115-116).

The duty to transport mail, under conditions which do not interfere with the ownership, possession, or operation of the railroad and in circumstances which confer an overall benefit to the railroad, does not constitute an eminent domain taking of private property under the Fifth Amendment. Cf. *United States v. Spouenbarger*, 308 U. S. 256, 264, 267. "That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power." *Legal Tender Cases*, 12 Wall. 457, 551. To constitute a taking, there must be an actual appropriation of some property right. It is not enough that use of the property has been restricted in some manner or that there has been a decrease in its value because of some Governmental action within the lawful scope of another legislative power. For Governmental action short of acquisition of title or occupancy to amount to a taking, its effects must be "so complete as to deprive the owner of all or most of his interest in the subject matter."

*United States v. General Motors*, 323 U. S. 373, 378; see, e.g., *United States v. Welch*, 217 U. S. 331; *Richards v. Washington Terminal Co.*, 233 U. S. 546.

The statutory requirement that railway common carriers transport the mails (39 U.S.C. 541), does not differ significantly from the duty imposed upon carriers generally to furnish transportation service "upon reasonable request therefor." 49 U.S.C. 1 (4). The obligation to carry the mails at fair and reasonable rates of compensation determined after administrative hearings does not, therefore, involve a taking of private property for public use any more or any less than the equivalent duty of common carriers by rail to transport freight for the public. *The Pipe Line Cases*, 234 U. S. 549. We have seen that when Congress enacted the Railway Mail Pay Act it intended to exercise its regulatory powers over railroad common carriers, *supra*, pp. 30-36.

The determination of reasonable rates at which utilities are required to serve the public is properly considered a regulation of the use of property within the scope of the police power and not an exercise of eminent domain. *Federal Power Commission v. Hope Gas Co.*, 320 U. S. 591, 601; *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U. S. 575, 582; *Munn v. Illinois*, 94 U. S. 113, 134; cf. *Nebbia v. New York*, 291 U. S. 502, 534-539. The duty of public service corporations was



emphasized in the dissenting opinion of Mr. Justice Cardozo in *Interstate Commerce Commission v. Oregon-Wash. R. & Nav. Co.*, 288 U. S. 14, 47, where he stated:

The time has gone by when the subjection of a public service corporation to control and regulation by the agencies of government is to have its origin and justification in the terms of a supposed contract between the corporation and the state. The origin of the subjection and its justification are to be found, not in contract, but in duty, a duty imposed by law as an incident to the enjoyment of a privilege. The discretion of managers and stockholders, at one time nearly absolute, is now subject in countless ways to compulsion or restraint in the interest of the public welfare.

In addition, the limited scope of judicial review traditionally exercised in railroad rate cases (see, e.g., *New York v. United States*, 331 U. S. 284, 331, 349) and the recognition that rate-making is essentially a "legislative power" (*Munn v. Illinois*, *supra*, at 133-134; *Federal Power Commission v. Natural Gas Pipeline Co.*, *supra*, at 586) are inconsistent with the view that the regulatory measures constitute an exercise of the power of eminent domain. Thus the opinion of Mr. Chief Justice Stone in the *Natural Gas Pipeline* case, states (p. 586):

The Constitution does not bind rate-making bodies to the service of any single formula

or combination of formulas. Agencies to whom this *legislative power* has been designated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, *the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped.* If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end. [Italics supplied].

The inapplicability of the eminent domain concept to rate-making is emphasized in the concurring opinion of Mr. Justice Black (p. 603):

\* \* \* when property is taken under the power of eminent domain the owner is "entitled to the full money equivalent of the property taken, and thereby to be put in as good position pecuniarily as it would have occupied if its property had not been taken." *United States v. New River Collieries Co.*, 262 U. S. 341, 343. But in rate-making, the owner does not have any such protection. We know, without attempting any valuation, that if earnings are reduced the value will be less. But that does not stay the hand of the legislature or its administrative agency in making rate reductions. As we have said, rate-making is one species of price-fixing. Price-fixing, like other forms of social legislation, may well diminish the value of the property which is regulated. But that is no obstacle to its validity.

Eminent domain concepts are no more appropriate to determining fair and reasonable rates of compensation for transporting mail than they are in the general field of rate-making. As indicated, under eminent domain the owner is entitled to the money equivalent of the property taken. The rates which a public utility is allowed to charge, however, determine the value of this property. Obviously, therefore, eminent domain value cannot determine rates if rates in turn determine value. As stated in the *Hope Natural Gas* case, "'fair value' is the end product of the process of rate-making not the starting point" (p. 601). "The heart of the matter is that rates cannot be made to depend upon 'fair value' when the value of the going enterprise depends on earnings under whatever rates may be anticipated." *Ibid.* The rates which the railroad will be permitted to charge, the Government for transporting mail or for any other transportation service form as integral a part of the enterprise's anticipated earnings as its income from any other source. They contribute to the value of the enterprise in the same manner as earnings from other types of traffic. The fairness and reasonableness of mail transportation rates are no more susceptible to measurement by eminent domain tests than are the rates to be charged private shippers for other services.

The fact that the Government may be the bene-

fiary of a governmental regulation of property does not convert the regulation into an eminent domain taking. *Lichter v. United States*, 334 U. S. 742; *Lincoln Electric Co. v. Forrester*, 334 U. S. 841; *Dayton-Goose Creek Ry. Co.*, 263 U. S. 456; cf. *Lynch v. United States*, 292 U. S. 571; *Horowitz v. United States*, 267 U. S. 458, 461; *Providence Bank v. Billings*, 4 Pet. 514, 561; *United States Trust Co. v. Helvering*, 307 U. S. 57, 60-61; *United States v. Commodore Park*, 324 U. S. 386. In the *Lichter* case, the Court explicitly stated that "the recovery by the Government of excessive profits received or receivable upon war contracts is in the nature of the regulation of maximum prices under war contracts \* \* \* rather than the requisitioning or condemnation of private property for public use" (p. 787). Nor does the fact that compensation is a constitutional requisite (*United States v. New York Central R. Co.*, 279 U. S. 73, 78) imply, as the railroad suggests (Pet. in No. 198, pp. 8-10) that the constitutional requirement is "just compensation" as for a taking.<sup>6a</sup> The Court of Claims was clearly correct, therefore, in holding that the determination of reasonable rates for transporting mail did not involve a taking of private property for public use.

<sup>6a</sup> Similarly, the opinion in the *Griffin* case does not support the theory of a taking. The reference to the *Great Falls, North American*, and *Jacobs* cases (see n. 4, *infra*, p. 26), we believe, suggests the possibility of Tucker Act jurisdiction, based upon a constitutional right rather than upon the particular constitutional right involved in those cases. And the determination of "the quantum meruit for carrying the mail" (*Griffin* case, p.



**The<sup>a</sup> Question of Jurisdiction Aside, the Court of Claims Exceeded the Proper Scope of Judicial Review**

The Interstate Commerce Commission has given varying degrees of weight in different proceedings to the results obtained from the use of the Plan 2 cost allocation formula. In the instant case, the Commission evaluated the results indicated by the cost formula, specified a number of factors which rendered it unreliable in the peculiar circumstances of this situation, adverted to a variety of other considerations of significance in the rate-making process, and concluded in a closely reasoned and well-supported opinion that the rates paid for transporting mail were fair and reasonable. See Appendix B. The Court of Claims, without analyzing or giving any weight to the weaknesses to which the Commission pointed, treated the formula as establishing the cost of transporting mail, measured this against the income received, computed a loss, and, without making any allowance for the other factors relied upon by the Commission, held that the railroad was entitled to recover its hypothetical expenses and a return of 5.75 percent on its hypothetical investment attributed to mail service through the Plan 2 formula. This resulted in an increase of 87.4 percent of the rates considered fair and reasonable by the Commission. We shall show that in its summary rejection of the factors deemed

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<sup>a</sup>237) does not import a taking. See *Union Pacific Railway Co. v. United States*, 116 U. S. 154, 158.

significant by the Commission, the court below departed from established standards employed in the judicial review of administratively determined rates. Moreover, even if the determination of mail pay rates be considered an eminent domain instead of a regulatory function, we shall show that the scope of review is similarly limited.

### A. STANDARDS OF JUDICIAL REVIEW

Even if it be assumed that there is jurisdiction in the Court of Claims to review the determination of the Interstate Commerce Commission, the court failed to give appropriate scope to the informed judgment of the expert administrative agency to which Congress delegated the function of prescribing "fair and reasonable" rates for transporting mail. *Ayrshire Collieries Corporation v. United States*, No. 25, this Term, decided January 3, 1949; *New York v. United States*, 331 U.S. 284; *Gray v. Powell*, 314 U.S. 402; *National Labor Relations Board v. Hearst Publications*, 322 U.S. 111. Thus, "Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow." *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 139-140. And even when, as here, the administrative order is said to be confiscatory, "If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result," the judicial inquiry is at an end. *Federal Power Com-*

*mission v. Natural Gas Pipeline Co.*, 315 U.S. 373, 386. See also *New York v. United States*, 331 U.S. 284, 334-340; *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 601-603.

With particular reference to the fixing of rates, this Court has stated that "as the ultimate determination whether or not rates are confiscatory ordinarily rests upon a variety of subordinate or primary findings of fact as to particular elements, such findings made by a legislative agency after hearing will not be disturbed save as in particular instances they are plainly shown to be overborne." *St. Joseph Stock Yards Co. v. United States*, 288 U.S. 38, 54.

The complexities involved in determining the proper proportion of the railroads' cost and investment to be allocated to carrying the mails (see *Railway-Mail Pay*, 56 L. C. C. 1-120; 144 L. C. C. 675-727), confirms "the wisdom of the narrow scope within which Congress has confined judicial participation in the rate-making process." *Board of Trade of Kansas City v. United States*, 314 U.S. 534, 546. "The determination of transportation costs and their allocation among various types of traffic is not a mere mathematical exercise. Like other problems in cost accounting, it involves the exercise of judgment born of intimate knowledge of the particular activity and the making of adjustments and qualifications too subtle for the uninitiated." *New York v. United States*, 331 U.S.

284, 313. The effect to be given a cost study is peculiarly within the province of the Commission and if "the record affords a sufficient basis for the Commission's determination, it is not subject to review in the courts." *Illinois Commerce Commission v. United States*, 292 U.S. 474, 481.

Notwithstanding the various possible formulae producing different results discussed by the Commission for the allocation of costs in the mail pay proceedings, the recognized deficiencies inherent in each of the formulae, the variation in the results achieved by apparently irrelevant changes in the basic data, and a host of other imponderables considered at great length by the Commission, the court below insisted upon the mathematical application, to the exclusion of all other factors, of a single formula for cost allocation which the Commission had consistently held was entitled only to limited weight along with various other relevant factors. See pp. 7-13, *supra*.<sup>7</sup>

This was the very antithesis of relegating to administrative responsibility the "task of striking a balance and reaching a judgment on factors beset with doubts and difficulties, uncertainty and speculation" and an attempt at judicial "appraisal of elements having delusive certainty." *United States v. Morgan*, 313 U.S. 409, 417. Although it

<sup>7</sup> The court's misconception of the reviewing function is illustrated by its statement that "it was for the Commission to demonstrate that the general rates prescribed gave the plaintiffs a fair and reasonable return" (R. 48).



has been said that courts are not "at liberty to prescribe general attitudes the Commission must adopt towards the exercise of discretion left to it rather than to courts" (*I. C. C. v. Inland Waterways Corp.*, 319 U.S. 671, 691), the court below in effect prescribed a precise formula. This is a far cry from the most recent pronouncement of this Court in the field of rate regulation to the effect that in fashioning the rate structure there in issue "there is no place for dogma or rigid formulae. The problem calls for an expert, informed judgment on a multitude of facts. The result is that the administrative rate-maker is left with broad discretion as long as no statutory requirement is overlooked. Yet that is, of course, precisely the nature of the administrative process in this field." *Appshire Collieries Corp. v. United States*, No. 25, this Term, decided January 3, 1949, slip opinion, p. 18.

The court's disregard of the Commission's expertness and the substitution of its own judgment for that of the Commission in this highly technical area of the specialized field of rate-making constituted a clear invasion of the field of administrative discretion.

#### B. THE STANDARDS OF JUDICIAL REVIEW ARE NOT DIFFERENT EVEN IF RATE-MAKING BE DEEMED EMINENT DOMAIN

We do not believe the scope of review would be altered if the statutory scheme for regulating rail-

way mail transportation be regarded as a taking of private property under eminent domain. The theory that rate-making involved eminent domain was prominent in rate cases until rejected by recent decisions. See *supra*, pp. 42-48. It must have been considered a peculiar area of eminent domain, however, since the role of the courts in determining "just compensation" did not resemble that played in classical eminent domain situations.

The rule that a rate was confiscatory unless it enabled the utility to earn a fair return on the present fair value of its property was based on the doctrine in the law of eminent domain that "just compensation" must be paid for property "taken" for public use. The Court pointed this out in *West v. Chesapeake & Potomac Tel. Co.*, 295 U.S. 662, 671, saying:

\* \* \* When the property itself is taken by the exertion of the power of eminent domain, just compensation is its value at the time of the taking. So, where by legislation prescribing rates or charges the use of the property is taken, just compensation \* \* \* is a reasonable rate of return upon that value.

The historical development of the fair value rule shows that the law of eminent domain was in fact its source. At first, in *Munn v. Illinois*, 94 U.S. 113, and companion cases, the Court held that "the people must resort to the polls, not to the courts" for protection against abuses in rate regu-

lation (94 U.S. at 134). Later, however, the Court receded from this view and held that the question of the reasonableness of rates was a judicial question (*Railroad Commission Cases*, 116 U.S. 307, 325, 331; *Chicago &c. Ry. Co. v. Minnesota*, 134 U.S. 418), pointing out that unreasonably low rates could not validly be prescribed because that would amount to a deprivation of property without due process of law or a taking of property without just compensation. *Railroad Commission Cases*, 116 U. S. 307, 325, 331; *Georgia Railroad & Banking Co. v. Smith*, 128 U. S. 174, 179; *Chicago &c. Ry. Co. v. Minnesota*, 134 U. S. 418, 458; *Budd v. New York*, 143 U.S. 517, 547. Then, in *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, the "fair value" rule emerged; the Court invalidated a rate order under which the company could not pay even one-half of its bond interest and said, *obiter* (p. 410):

\* \* \* If the State were to seek to acquire the title to these roads, under its power of eminent domain, is there any doubt that constitutional provisions would require the payment to the corporation of just compensation, that compensation being the value of the property as it stood in the markets of the world, and not as prescribed by an act of the legislature? Is it any less a departure from the obligations of justice to seek to take not the title but the use for the public benefit at less than its market value?

At about the same time, the lower court in *Smyth v. Ames*, 169 U.S. 466, held that the principles of eminent domain must apply in rate regulation, saying (*Ames v. Union Pacific Ry.*, 64 Fed. 165, 177 (C.C. D. Neb.));

Now, if the public was seeking to take title to the railroad by condemnation, the present value of the property, and not the cost, is that which [it] would have to pay. In like manner, it may be argued that, when the legislature assumes the right to reduce, the rates so reduced cannot be judged unreasonable if, under them, there is earned by the railroad company a fair interest on the actual value of the property.

\* \* \*

And the analogy of a "taking" was expressly referred to again in *Smyth v. Ames*, 169 U.S. 466.

Thus this test extracted from the law of eminent domain became the basis of the "fair value" rule of *Smyth v. Ames* for determining the constitutionality of rates. See Henderson, *Railway Valuation and the Courts*, 33 Harv. L. Rev. 902, 906-912; Hale, *Conflicting Judicial Criteria of Utility Rates*, 38 Col. L. Rev. 959, 960-964. As we have shown, the rule was still placed on that basis as late as *West v. Chesapeake & Potomac Tel. Co.*, 295 U.S. 662. See also *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 51, and the dissenting opinion of Mr. Justice Reed in *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. at 620.

The employment of the eminent domain analogy,



however, did not enlarge the traditional scope of review in rate cases. The compass of judicial examination of administrative action was still kept within narrow limits despite discussion of the problem of regulation in terms of eminent domain. Although the use of this concept may have resulted in a judicially established standard of a fair return on a fair value, it did not countenance a substitution for administrative expertness of the Court's judgment with respect to such matters as the proper allocation of cost factors and the pertinence of charges for comparable services. Thus, notwithstanding adherence to an eminent domain theory this Court in *West v. Chesapeake & Potomac Tel. Co.*, 295 U.S. 662, and *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 54, for example, stressed the limited function of judicial review. In the *West* case, the Court explicitly said (295 U.S. 662, 679-680): "It is not our function, and was not the function of the court below, to do the work of the Commission by determining a rate base upon correct principles." Accordingly, return to an eminent domain theory in this case would not invoke different principles of review.<sup>8</sup> See also the concurring opinion of Mr. Justice Brandeis in *St. Joseph Stockyards* case, at p. 78, and the dissenting opinion of Mr. Justice Reed in the *Hope Natural Gas* case, at pp. 620-621.

<sup>8</sup> The Government's brief in *United States v. Cols.* No. 132, this Term, presents the view that the Constitutional standard of "just compensation" may be given content by legislative action in the same manner as other Constitutional standards

Since the determination of adequate compensation was appropriately committed to the Interstate Commerce Commission, whether the delegated rate-making function be considered an exercise of the power of eminent domain or a regulation under the commerce or postal power, "the sole remaining question would be whether the Commission in arriving at its determination departed from the applicable rules of law and whether its finding had a basis in substantial evidence or was arbitrary and capricious." *Shields v. Utah Idaho R. Co.*, 305 U. S. 177, 185.

### III

#### **The Commission Correctly Denied the Railroad's Application for Higher Rates**

"The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas" *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586.

The court below was clearly in error, therefore, in holding that fair and reasonable rates must be determined by application of a particular formula which compelled compensation for abnormal amounts of unused space not devoted to transpor-

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and that the legislative judgment is entitled to the same deference that is accorded it in other areas. We believe comparable arguments may be made with respect to the delegation of the function to administrative agencies. Because of our view that in the field of rate regulation the standards of review are the same whether or not eminent domain is deemed to be involved, we do not present extended argument on the point.

tation of the mails. Moreover, whatever the appropriate scope of review, the factors relied upon by the Commission in the present situation to impugn the validity of the results indicated by the cost study and to justify a departure from giving sole consideration to cost and return on investment in determining rates, are not only intrinsically sound but find support in the Railway Mail Pay Act and the decisions of this Court.<sup>9</sup>

#### A. THE COURT'S FORMULA WAS NOT THE COMMISSION'S FORMULA

The statement of the Court of Claims that it was not making its own determination of fair and reasonable rates but was merely correcting the Commission's error of law and applying the proper rule of law to the Commission's findings erroneously assumes or asserts that the Commission had adopted Plan 2 as the proper method of determining mail cost and investment (R. 43, 44, 49). But the Commission had clearly rejected Plan 2, on the basis of a variety of valid considerations, as a controlling formula for determining mail costs and reasonable rates. In its first report in 1933,

<sup>9</sup> The Commission has on numerous occasions granted the applications of carriers for increased railway mail pay. *Railway Mail Pay*, 85 I.C.C. 157; *Railway Mail Pay*, 95 I.C.C. 204; *Railway Mail Pay*, 95 I.C.C. 493; *Railway Mail Pay*, 96 I.C.C. 43; *Railway Mail Pay*, 104 I.C.C. 521; *Railway Mail Pay*, 109 I.C.C. 13; *Railway Mail Pay*, 112 I.C.C. 151; *Railway Mail Pay*, 120 I.C.C. 439; *Railway Mail Pay*, 123 I.C.C. 33; *Railway Mail Pay*, 144 I.C.C. 675; *Railway-Mail Pay*, 151 I.C.C. 734; *Railway Mail Pay*, 269 I.C.C. 357.

on the request for reexamination of the mail rates paid the railroad, the Commission pointed out that the cost formula which it had used in originally fixing rates was not "an accurate ascertainment of the actual cost of service," but was merely "an approximation to be given such weight as seems proper in view of all the circumstances". Appendix B, p. 8. Even prior to its order with respect to the railroad's application for reexamination, the Commission had clearly recognized in its general mail pay order of July 10, 1928 (144 I. C. C. 675), that the results obtained under the cost allocation formula were more theoretical than actual. This report not only discussed the inadequacies of this method of cost determination (144 I. C. C. 675, 691-692), but clearly rejected it as a single criterion for determining rates of compensation. Although application of the formula indicated a rate increase of 25 per cent (144 I. C. C. at 688), an increase of only 15 per cent was allowed. 144 I. C. C. at 695.<sup>10</sup>

The rejection of the Plan 2 formula in the instant case was made crystal clear when the Commission pointed out, on the rehearing of the application for reexamination, that it had consistently, in its mail pay proceedings (citing references), given consideration to factors other than the hypothetical cost obtained by application of the space-study method, such as the amount and character of a railroad's unused space, the actual

<sup>10</sup> It is not even clear that the rates fixed in the original general mail pay order were based on a mathematical translation of the cost formula. 56 I. C. C. 1.



space occupied by mail as distinguished from authorized space, comparisons of compensation received from mail service with compensation received from other services in passenger-train cars, comparisons with freight rates, comparisons of the computed cost of ~~and revenue from mail service~~ ~~and mail revenue with the computed cost of~~ corresponding units in passenger-train service as a whole, and the character of the service performed in connection with transporting the mail. Appendix B, pp. 16-17. The lower court's computation of rates on the Plan 2 formula was, therefore, not an application of the law to the findings of the Commission. The Commission had found that the Plan 2 formula was inapplicable. Its use by the court below was simply an independent judgment that a particular formula properly measured fair and reasonable rates despite a contrary finding by the Commission, a finding, which, on the record in this case, is binding upon the Court of Claims and every other court.

#### B. THE COMMISSION'S CONSIDERATION OF OTHER FACTORS WAS CLEARLY APPROPRIATE

The Commission plainly was acting within the proper scope of its discretion when it undertook to test the cost allocation formula against the facts of the particular case and when it gave weight to such other factors as comparative rates for comparable services and the value of the services to the shipper. The unreliability of cost allocation

formulas has received recent recognition in this Court. *United States v. Felin & Co.*, 334 U. S. 624. The peculiar competence of expert administrative bodies to deal with the subtle, complex and often baffling problems presented in attempting properly to determine the proportion of expenses to be attributed to particular services has long been established. *Illinois Commerce Commission v. United States*, 292 U. S. 474, 481; *New York v. United States*, 331 U. S. 284, 335. And it is no longer open to dispute that in the determination of a fair and reasonable rate it is appropriate to consider other factors than the cost of providing the service and the rate of return on the investment employed in providing the service. As early as *Smyth v. Ames*, *infra*, and as recently as *Federal Power Commission v. Hope Natural Gas Co.*, it was held that the reasonable value of the service to the consumer as well as the rate of return to the utility is a proper factor in determining a fair and reasonable rate. In the recent case of *Ayrshire Collieries Corporation v. United States*, No. 25, this Term, decided January 3, 1949, the propriety of adopting a system of rate-making disregarding comparative distances "which encourages competitive production and a more even development of an area" was made clear. This decision also restates the long standing rule that unduly discriminatory or unduly preferential rates

may be invalid without consideration of adequacy of return. Statutory provisions against discrimination among shippers, as well as the specific provisions and the legislative background of the Railway Mail Pay Act, would seem to underscore the propriety of the Interstate Commerce Commission's comparison of mail revenue with other revenue in determining the reasonableness of rates. The application of these principles in the instant case demonstrates the unassailability of the rates fixed by the Commission as reasonable.

1. *Factors in cost allocation.*—Many of the factors referred to by the Commission as undermining the validity of the Plan 2 cost formula in other proceedings were present here. The cost figures were found to be unfairly weighted against the mail traffic, because space in the baggage car was allocated to mail traffic on the basis of the total space authorized, although the mail traffic actually used considerably less than the authorized space. Appendix B, pp. 22-23. Excessive amounts of unused space were also found to mitigate against complete dependence on the cost formula. Although a 15-foot apartment was authorized, the railroad at times furnished a 30-foot apartment for its own convenience and a portion of the additional 15 feet of unused space was allocated to the mail traffic. The Commission found that forty-four per cent of the total space in combination cars moved was unused and a substantial proportion of this unused

space was allocated under the cost study method to the mail traffic. Appendix B, pp. 19-20. If no part of the extra 15 feet of the 30-foot apartment were allocated to mail traffic, the reduction in expense charged to the mail traffic would have resulted in a computed profit. Appendix B, pp. 19-20.<sup>11</sup> Furthermore, the Commission found that the cost of operating the space actually authorized for mail, omitting allocated unused space, compared with the rate paid for this space, permitted a generous return on investment. Appendix B, pp. 25-26.<sup>12</sup>

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<sup>11</sup> The railroad contends that its use of a 30-foot apartment at various times when a 15-foot space was ordered (R. 26) was of no consequence because the unused space would have been the same in any event. Br. in Opp. pp. 26-28. This argument rests on the assumption that the unused 15-feet of the 30-foot apartment would have remained unused had it been available for express and baggage, as it would have been if not included in a postal apartment. The Commission expressly refused to make this assumption. Appendix B, p. 19. On the contrary, it found that if the "amount of unused space due to the operation of the 30-foot apartment in lieu of a 15-foot apartment . . . were eliminated from the total apportioned to mail and assigned to the other services upon the assumption it was and is unnecessarily operated in so far as mail is concerned, an assumption justified upon this record, . . . the computed mail expense would be reduced to . . . \$1,711 less than the revenue." Appendix B, p. 20.

<sup>12</sup> The following findings of the court below are not without significance: Receipts from mail traffic—approximately \$250,000 for the period 1931-1938—constituted net additions to revenue (R. 35, 116, 129). Neither the 15-foot apartment service nor the closed-pouch service furnished by respondents required them to incur any significant costs which they would not have incurred even if they had carried no mail whatever (R. 35, 116).



Thus, when the railroad supplies a 30-foot apartment, although a 15-foot apartment is required, the effect of the decision below would be to require the Government to pay double compensation for space which it does not use. Wholly apart from the question whether the Commission has the authority to disregard some or all of the authorized but unused space in fixing rates, there is a serious question whether it is legally permissible to increase the cost to the Government through the use of oversized equipment.<sup>13</sup> The statute provides that "the Postmaster General may accept cars and apartments of greater length than those of the standard requested, but no compensation shall be allowed for such excess lengths." 39 U.S.C. 532. The legislative background indicates that the provision was intended to free the Government from additional costs imposed upon it through the use of oversized equipment. Senate Hearings on H.R. 10484, 64th Cong., 1st sess., p. 9; 51 Cong. Rec. 13405; H. Doc. 1153, 63d Cong., 2d sess., p. 100; Preliminary Report and Hearings of the Joint Committee on Postage on Second-Class Mail Matter and Compensation for the Transportation of Mail, January 24, 1913, to April 3, 1914, pp. 861-

<sup>13</sup> Tabulations made by the Office of Railway Mail Adjustments of the Post Office Department disclose that a total of 9,069,053 sixty-foot car miles of unused space were operated by mail-carrying railroads during the year 1946 as a result of the use of oversized post-office cars and apartments. An additional 4,638,950 sixty-foot car miles of unused space were operated as a result of the use of oversized storage cars.

863. In addition, several decisions of this Court suggest that fair and reasonable rates are not required to include compensation for unused capacity which is not devoted to the service of the customer. *Cornington & Lexington Turnpike Co. v. Sandford*, 164 U. S. 578, 596; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439; *Public Service Commission v. Utilities Co.*, 289 U. S. 130, 135; *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U. S. 575, 590; cf. *Atehison, T. & S. F. Ry. v. United States*, 225 U. S. 640. Whether or not it is permissible to include the cost of operating unused space in mail rates, it seems clear error for a reviewing court to make the inclusion of such cost mandatory.

To permit the mechanical rule announced by the Court of Claims to stand would impose upon the Government large and unjustified liabilities. As previously shown, the cost allocation formula upon which the court below calculated its judgment was employed by the Interstate Commerce Commission in 1919 in the first general mail pay case, 56 I.C.C. 1. The rates promulgated at that time used this formula for estimating the average cost to all the railroads of transporting the mails. General rates for all similarly classified railroads, as contemplated by the statute (39 U.S.C. 549), Appendix A, *infra*, p. 96, were then fixed. Although this formula has not been the single basis for fixing rates since that time, the court below applied the formula to the particular cost of op-

erating plaintiff's railroad. It must be clear that Congress did not contemplate, when it authorized general rates, that each railroad whose operating costs exceeded the average would be able to recover additional compensation based on its higher operating costs. Where an average of costs is computed, it is reasonable to expect that the costs of approximately one-half the railroads will exceed the average and the remainder will fall below it. On the theory of the court below, a general order fixing rates on some such a common denominator basis would in effect fix rates for only half the railroads. Those performing better than average would be permitted to retain their better than average compensation and those performing worse than average would be permitted to recover additional compensation. It is inconceivable that the statutory provision for general rates contemplated, or any rule of law requires, this result. See *Bowles v. Willingham*, 321 U. S. 503, 518; *New England Division Cases*, 261 U. S. 184.<sup>14</sup>

The core of the problem in the instant case seems to be the financial straits in which the railroad has found itself almost from its establishment. The railroad was incorporated in 1926 and has been in receivership ever since 1929 (R. I). Its difficulty seems to be an inability to obtain sufficient business, as indicated by the Commission's finding

<sup>14</sup> See the dissent of Commissioner Eastman from the 1928 general increase order, which attacks the cost allocation formula adopted by the court below as unsatisfactory regardless of any special circumstances. 144 I.C.C. 675, 725-727.

with respect to unused space. This does not entitle it to obtain a subsidy from the Government in the form of "reasonable" rates by charging the cost of excessive unused space to mail transportation. As a consequence of the mechanical allocation of all unused space to the various services including the mail, the amount of unused space apportioned to mail would necessarily increase as the amount of other traffic decreased. Thus, the fairness and reasonableness of mail rates would depend on the amount of other traffic carried. The *reductio ad absurdum* of this mechanical cost allocation would be that if there were no other traffic the entire cost of operation would have to be charged to transportation of mail. Certainly such a result would not be admissible except in a situation in which the Government required the railroad to continue in operation for the sole purpose of carrying the mail. In this case, on the contrary, as we have seen, the railroad resisted the Government's effort to withdraw from this carrier a substantial part of the mail service authorized.

No rule of law requires that regulated rates to be reasonable must guarantee a carrier a profit. Where inability to earn a profit results from ordinary business factors there is no Constitutional requirement that rates be increased. This was forcefully pointed out in *Market Street R. Co. v. Comm'n*, 324 U. S. 548, 566-567, in the following language:



It is idle to discuss holdings of cases or to distinguish quotations in decisions of this or other courts which have dealt with utilities whose economic situation would yield a permanent profit, denied or limited only by public regulation. \* \* \* They [the considerations applicable in above situations] obviously are inapplicable to a company whose financial integrity already is hopelessly undermined, which could not attract capital on any possible rate, and where investors recognize as lost a part of what they have put in. It was noted in the *Hope Natural Gas* case that regulation does not assure that the regulated business make a profit. \* \* \* Without analyzing rate cases in detail, it may be safely generalized that the due process clause never has been held by this Court to require a commission to fix rates on the present reproduction value of something no one would presently want to reproduce, or on the historical valuation of a property whose history and current financial statements showed the value no longer to exist, or on an investment after it has vanished, even if once prudently made, or to maintain the credit of a concern whose securities already are impaired. The due process clause has been applied to prevent governmental destruction of existing economic values. It has not and cannot be applied to insure values or to restore values that have been lost by the operation of economic forces.

See also *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U. S. 575, 586.

2. *Comparison with rates charged for other services.*—The Commission pointed out that, based on space units which included proportionate amounts of unused space, “the mail service pays considerably more for equivalent units of service than passenger proper, or express. \* \* \* Upon a computed unit-of-service basis, the amount paid by the department for carrying mail was about two and one-half times as much as the amount received by applicant from carrying express and about six times as much as the amount received for passenger service proper.” Appendix B, p. 24.

The propriety of using this favorable comparison of railway mail rates with charges for other passenger services is clear. The Railway Mail Pay Act specifically authorizes the Postmaster General to arrange for the transportation of other than first class mail at rates not exceeding those charged express companies for the transportation of express matter, and requires the railroads to carry mail at these rates. 39 U. S. C. 557.<sup>15</sup> The statute also contemplates that arrangements may be made for conveying mail in freight trains “for which rates not exceeding the usual and just freight rates may be paid.” 39 U. S. C. 555. At other times, Congress has indicated a policy of requiring transportation of mail by railroad at fair and reasonable

<sup>15</sup> In each year during the period 1930-1947, non-local first class mail approximated less than 6 per cent by weight of all other mail. United States Post Office Department, Cost Ascertainment Reports for years 1930-1947.

rates not to exceed the rates paid by private parties for the same kind of service. See statute discussed in *Union Pacific Railway Co. v. United States*, 116 U. S. 154. In determining fair and reasonable rates, a proper element for consideration was said to be the charges for comparable passenger train service. *Id.* at 155-156. The power of Congress to provide for, and the duty of carriers to observe, equality of rates among shippers has long been established. 49 U. S. C. 2 and 3. Not even "self-interest of the carrier" may "override the requirement of equality in rates." *United States v. Illinois Central R. R. Co.*, 263 U. S. 515, 524. The power of the Commission to determine and prescribe just and reasonable rates to eliminate unjust discrimination and undue preference has recently been confirmed. *Ayrshire Collieries Corp. v. United States*, *supra*; see also *Interstate Commerce Commission v. Baltimore & Ohio R. R. Co.*, 145 U. S. 263, 277; *American Express Co. v. Caldwell*, 244 U. S. 617, 624; *Interstate Commerce Commission v. Inland Waterways Corp.*, 319 U. S. 671, 685; *New York v. United States*, 331 U. S. 284, 344-346. Against this background it cannot seriously be urged that the Commission acted arbitrarily in giving weight to the charges made to other shippers for comparable services. The weakness of the contrary view becomes plain when it is remembered that at least the rates for express services are not imposed by the Commission but are voluntarily fixed by the plain-

tiff railroad,<sup>16</sup> and that the railroad has not shown that it has ever attempted to secure authorization for increased passenger rates which would bring those rates into line with the existing mail rates.

The legislative history of the Railway Mail Pay Act demonstrates that in the enactment of 39 U. S. C. 557, Congress considered express traffic comparable to non-first class mail traffic and wanted the Government to pay no more than the express companies. Appendix A, *infra*, p. 98. All of the commissions appointed to investigate the subject of railway mail pay had made the relationship of express and mail rates the subject of study.<sup>17</sup>

On August 24, 1919, a joint Congressional Committee, better known as the Bourne Commission, was appointed to inquire into the question of railway mail pay.<sup>18</sup> This committee attempted to make a detailed comparison between the relative earnings by railroads from express and mail and the char-

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<sup>16</sup> See *Increased Express Rates and Charges*, 1946, 269 I.C.C. 161, and 266 I.C.C. 369.

\* <sup>17</sup> Hubbard Commission in 1878 (S. Mis. Doc. 14, 45th Cong., 2d sess.); Elmer-Thompson-Slater Commission in 1883 (H. Ex. Doc. No. 35, 48th Cong., 1st sess.); Wolcott-Loud Commission, a congressional commission, in 1901 (S. Doc. No. 89, 56th Cong., 2d sess.); Hitchcock Commission in 1911 (H. Doc. No. 105, 62d Cong., 1st sess.); Bourne Commission, a congressional commission, in 1914 (H. Doc. 1155, 63d Cong., 2d sess.).

<sup>18</sup> The section of the act authorizing this joint committee was the so-called Parcel Post Act of 1912 (Act of August 24, 1912, 37 Stat. 539, 557).



acter of service rendered for these classes of rail traffic.<sup>19</sup>

The legislative history of the Railway Mail Pay Act shows the extensive efforts to compare the rates received by the railroads from the Post Office Department with the rates received by the railroads from express companies.<sup>20</sup> As a result, Congress

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<sup>19</sup> Preliminary Report and Hearings of the Joint Committee on Postage on Second-Class Mail Matter and Compensation for the Transportation of Mail of the Congress of the United States (Bourne Commission), January 24, 1913, to April 3, 1914, pp. 199-201, 360-361, 437-445, 502-507, 650-651, 695-698, 743-758, 773-777, 783-788, 893-895, 1162-1164, 1271-1280, 1304-1316, 1334-1341, 1352-1361, 1390-1401, 1481-1489, 1509-1511; H. Doc. 1155, Report of the Joint Committee on Postage on Second-Class Mail Matter and Compensation for the Transportation of Mail (Bourne Commission Report), August 31, 1914, 63d Cong., 2d sess., pp. 90-94.

As a development in these hearings, the Post Office Department modified its two prior legislative proposals and incorporated Section 557 in its present form in the so-called "Third Plan" and "Fourth Plan" of the Department. H. Doc. 1155, 63d Cong., 2d sess., August 31, 1914, pp. 76, 80. The "Fourth Plan" was embodied in H. R. 17042, 63d Cong., 2d sess., which did not pass the Senate; and again in H. R. 19906, 63d Cong., 3d sess., the Post Office Appropriation Act for 1916, from which the Senate struck the provisions relating to railway mail-pay.

<sup>20</sup> This statutory history is fully discussed in the debates on H. R. 10484, 53 Cong. Rec. 9693, 9825-9830, 11246, 11248-11249, 11252.

See also footnote ; Hearings on H. R. 17042 before the Senate Committee on Post Offices and Post Roads, 63d Cong., 2d sess., August 18, 20, and 26, 1914, pp. 81-82; Hearings on H. R. 17042 before the House Committee on the Post Office and Post Roads (revised), 63d Cong., 2d sess., June 5, 1914, p. 29; Debates on H. R. 17042, 63d Cong., 2d sess., 51 Cong. Rec. 13395-6, 13402-3, 13408; Hearings on Bills relating to Railway Mail Pay before the Senate Committee on Post Offices and Post Roads, 63d Cong., 3d sess., January 13 and 14, 1915, pp. 87-89; Debates on H. R. 19906, 63d Cong., 3d sess., 52 Cong. Rec. p. 777; Hearings on Post Office Appropriation Bill, 1917, before Subcommittee No. 1 of the House Committee

became thoroughly familiar with the problem of making a comparison of mail and express rates. It had before it the contentions of the railroads with respect to dissimilarities in the circumstances and conditions of mail and express services, as well as the opposing views of the Post Office Department and others. By its enactment of Section 557, Congress resolved the issue and concluded that the services performed in connection with the transportation of non-first-class mail and express were so similar that discrimination in favor of express would be unjustifiable. Hence, machinery for equalization of the rates for these two classes of services was provided in Section 557.

In the debates on H.R. 17042, 63d Cong. 2d Sess., a bill which failed of Senate passage but which was closely related to the Railway Mail Pay Act as finally enacted, Chairman Moon of the House Committee on the Post Office and Post Roads stated:

This provision is directed to the ascertainment of a rate which the railroad companies would derive from the carrying of express

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on the Post Office and Post Roads, 64th Cong., 1st sess., December 1915 and January 1916, Part III, pp. 672-3, 681, 775; Hearings on Bills relating to Railway Mail Pay before the Senate Committee on Post Offices and Post Roads, 64th Cong., 1st sess., March 20, 21, and 22, 1916 (Trunk Lines), p. 36-7—March 22 and 23 (Short Lines), p. 36; Hearings on H.R. 10484 before the Senate Committee on Post Offices and Post Roads, 64th Cong., 1st sess., April 14, 15, 17, 18, and 19, 1916, pp. 74-76; Debates on H.R. 10484, 64th Cong., 1st sess., 53 Cong. Rec. 2318, 2464-5, 3217-19, 9695-6, 9830, 9833.

matter that is analogous in character and method of transporting to mail matter.<sup>21</sup>

In the House debates on H.R. 19906, 63d Cong., 3d Sess., the purpose of what became 39 U. S. C. 557 (Appendix A, *infra*, pp. 98-99) was stated to be as follows:

\* \* \* \* \*

MR. LEWIS of Maryland. \* \* \* The Postmaster General, under this clause, would have the right to go to the Interstate Commerce Commission and get what would be necessary to him as a shipper, namely, an equal rate.

\* \* \* \* \*

MR. MADDEN [a member of the House Committee on the Post Office and Post Roads]. Here is what it authorizes: It authorizes the Postmaster General to ascertain from the Interstate Commerce Commission what the express companies pay the railroad companies, and if he finds the express companies are paying the railroad companies less than the Government is paying them, then he has the right

<sup>21</sup> 51 Cong. Rec. 13408; see also Hearings on H.R. 17042 before the House Committee on the Post Offices and Post Roads (revised), 63d Cong., 2d sess., June 5, 1914, pp. 28-29; Hearings on H.R. 17042 before Senate Committee on Post Offices and Post Roads, 63d Cong., 2d sess., August 18, 20, and 26, 1914, pp. 81-82; Hearings on Bills relating to Railway Mail Pay before the Senate Committee on Post Offices and Post Roads, 63d Cong., 3d sess., January 13 and 14, 1915, p. 79; Hearings on Bills relating to Railway Mail Pay before the Senate Committee on Post Offices and Post Roads, 64th Cong., 1st sess., March 22 and 23, 1916 (Short Lines), p. 70.

to demand the same rate that the express companies are paying the railroads.

\* \* \* \* \*

MR. LEWIS of Maryland. \* \* \* We find the express companies are paying only 18 cents per car mile, and we find that fact by going to the Interstate Commerce Commission. Then we have the right to demand of the railroads that they will carry everything except first class, which is the kind of stuff carried by express companies, at the rate of 18 cents per car mile. The railroad can protect itself by raising its rate to the express companies. If it will not do that, it ought to protect the Government by giving it equal rates as a shipper as anybody else. The Government is entitled to equal rates as a shipper. That means a rate as low as any other kind of shipper of the same matter, and the object of the clause is to secure to the Government as a shipper an equality with every other kind of shipper.<sup>22</sup>

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The hearings on H.R. 10484 (which became the Railway Mail Pay Act) before the Senate Committee on Post Offices and Post Roads,<sup>23</sup> which were read into the record on the floor of the Senate when Section 557 was specifically debated, reflect the same purpose. Senator Husting first described Section 557 as one of "certain special provisions in the bill as passed by the House which, first, would

<sup>22</sup> 52 Cong. Rec. 776-777.

<sup>23</sup> 64th Cong., 1st Sess., April 17, 1916, pp. 45-46.



enable the Postmaster General to arrange for the transportation of mail matter other than first class at rates not exceeding those which the Interstate Commerce Commission should find to be paid by express companies to the railroad companies for the transportation of express matter," and then quoted the testimony of the draftsman of the bill before the Committee, as follows:

SENATOR HARDWICK. The object of these provisions to which you have referred and read into the record is to extend that economy further on those classes of mail?

MR. STEWART. Yes, sir; and also to secure, through the instrumentality of the Interstate Commerce Commission, the same rates for this mail matter as the railroads charge the express companies.<sup>24</sup>

The conclusion is inescapable that Congress intended the Government to be given the benefit of rates which would place it in a position of equality with the express company as a shipper. In giving consideration to charges for other types of passenger train traffic, particularly express, the Commission was carrying out a clearly indicated policy of Congress.

<sup>24</sup> 53 Cong. Rec. 9825.

**The Decision of the Court of Claims Is Not Sustained by Traditional Judicial Standards of "Just Compensation"**

Even if traditional judicial standards of "just compensation" are invoked, the railroad is entitled to no additional compensation. This Court has stated that just compensation "means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken \* \* \*." *Seaboard Air Line Ry. Co. v. United States*, 261 U. S. 299, 304. The most reasonable and satisfactory criterion which the courts have devised for determining just compensation (although perhaps not the perfect one, *United States v. Miller*, 317 U. S. 369, 374) is the market value of the property at the time of the taking, expressed in terms of dollars and cents. *Albrecht v. United States*, 329 U. S. 599; *United States v. Petty Motor Co.*, 327 U. S. 372, 377; *United States v. General Motors Corp.*, 323 U. S. 373, 379; *United States ex rel. T. V. A. v. Powelson*, 319 U. S. 266, 275; *Olson v. United States*, 292 U. S. 246, 255; *Brooks-Scanlon Corp. v. United States*, 265 U. S. 106, 124; *L. Vogelstein & Co., Inc. v. United States*, 262 U. S. 337, 340; *United States v. Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 80.

Where there is in fact no market in which the property in question is being actively bought and sold, market value is determined by judicial postu-

lation of such a market and ascertainment of "the amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy \* \* \*."

*Olson v. United States*, *supra*, at 257; *Brooks-Scanlon Corp. v. United States*, *supra*, at 124. But where an actual market does exist, and there is trading in the commodities requisitioned, there is no need to resort to judicial hypothesis, and the prevailing market prices become the determinant of market value and of just compensation. *L. Vogelstein & Co., Inc. v. United States*, *supra*; *United States v. New River Collieries Co.*, 262 U. S. 341; *C. G. Blake Co. v. United States*, 275 Fed. 861 (S. D. Ohio), affirmed, 279 Fed. 71 (C. A. 6). In such circumstances, "The worth of a thing is the price it will bring." *Standard Oil Co. v. Southern Pacific Co.*, 268 U. S. 146, 158.

Cost is never the criterion for determining market value of a commodity and fair compensation for its taking. "It is the property and not the cost of it that is protected by the Fifth Amendment." *Brooks-Scanlon Corp. v. United States*, 265 U. S. 106, 123. " \* \* \* the Fifth Amendment allows the owner only the fair market value of his property; it does not guarantee him a return of his investment." *United States ex rel. T. V. A. v. Powelson*, 319 U. S. 266, 285. See, also, *Olson v. United States*, 292 U. S. 246, 255; *United States v. New River Collieries Co.*, 262 U. S. 341,

344: *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 328.

Nor does the fact that the market prices were regulated impair their effectiveness in proper circumstances as the measure of fair compensation. With a ready market, market prices remain the best measure of market value. There is no logic in disregarding actual market prices because they may reflect conditions in the market which are imposed or spring from governmental intervention. They still measure the money equivalent of what the owner could receive for his property. This is particularly true in a case like the present where it seems certain that the owner could obtain no more were the market a free one and where the property taken (principally the use of car space) could not be preserved for future sale in a better market.

The language of the concurring opinion of Mr. Justice Reed in *United States v. Felin & Co.*, 334 U.S. 624, to the effect "that whenever perishable property is taken for public use under controlled-market conditions, the constitutionally established maximum price is the only proper standard of 'just compensation'" (p. 643) is peculiarly pertinent here, since the services "taken" by the Government were "perishable" in the sense that the railroad could not withhold them from the current market.

The record in this case indicates that the rates fixed by the Commission were at least as high as



they would be on a free, unregulated market. This is shown by the desire of other carriers to furnish the service at the established rates (R. 96-97), and further corroboration is furnished by the fact that the rates fixed by the Commission for transporting mail yielded a greater return to the carrier than the applicable rates, which, in part at least, were the result of voluntary action by the railroad, for comparable units of passenger, baggage and express traffic. *Supra*, pp. 70-71-72. Finally, the willingness of the plaintiff railroad to sell space for mail transportation, and its resistance to the loss of this business at the established rates, indicate that the market price, though Government-regulated, was nevertheless a genuine one.

Even if the Commission's rates were lower than they would have been on a free market, other language of Mr. Justice Reed in the *Felin* opinion is pertinent (pp. 645-646):

It would be anomalous to hold that Congress can constitutionally require persons in the position of the respondent to sell their perishable property to the general public at a fixed price or not to sell to anyone and later to hold that the Government must pay a higher price than the general public where it requisitions the perishable property because of a replacement cost, greater than the fixed price. It is true that the United States by exercising its power of requisitioning compelled the respondent to sell to it; but the compulsion to sell to

the general public at ceiling prices was hardly less severe. \* \* \*

Similarly, in *L. Vogelstein & Co., Inc. v. United States*, 262 U. S. 337, this Court approved the prevailing market price as a standard of just compensation, without considering perishability, although that price was fixed with the approval of the President and did not necessarily reflect conditions of supply and demand in a free market unhampered by war conditions.

The contemplated objectivity of the Congress in providing for the present system for determining railway mail rates is evidenced by the system devised of having the Postmaster General and the carriers appear in opposing roles before the Interstate Commerce Commission. See, *e.g.* 39 U.S.C. 545-548. Moreover, it is clear that the regulation by the Interstate Commerce Commission of transportation charges for mail was conceived by Congress to be but another aspect of its general rate-making duties in the field of rate-transportation, and ordinary standards of determining fair and reasonable rates were intended to be made applicable. The Government sought no special advantage. See *supra*, pp. 30-36. The rates of general application fixed by the Commission therefore represented at least the current market value of the services and could be considered a proper measure of "just compensation."

## V

**The Railroad Is Not Entitled to Interest On Its Judgment**

The railroad in its cross-petition (No. 198) contends that the Court of Claims erred in refusing to allow interest on the principal amount of the judgment awarded as additional compensation for transporting mail. This claim is grounded upon the theory that the duty to transport mail under the provisions of the Railway Mail Pay Act constitutes a taking of property which entitles the railroad to "just compensation" under the Fifth Amendment. Admittedly, if there had been a taking of property in the eminent domain sense, the prohibition against the allowance of interest on claims prior to judgment would not apply.<sup>25</sup> *Jacobs v. United States*, 290 U.S. 13; *Seaboard Air Line v. United States*, 261 U.S. 299, 302. The Court of Claims, however, held that it was not determining just compensation and denied the claim for interest. For the reasons set forth in Point I, D, we believe that the Court of Claims was clearly correct in its decision that there was no eminent domain taking. It follows, therefore, that the railroad may not recover interest. See, e.g.

<sup>25</sup> Section 177(a) of the Judicial Code (28 U.S.C. [1946 ed.] 284(a)) reads as follows:

No interest shall be allowed on any claim up to the time of rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest.

This section is now embodied in 28 U.S.C. 2516.

*United States v. Thayer-West Point Hotel Co.*,  
329 U.S. 585.

The inapplicability of eminent domain concepts in the instant case is emphasized by the railroad's claim for interest "from the respective times when the pro-rata portions of said amount [the additional compensation claimed] became due" (R. 11-12). This presumably refers to the time of the periodic payments made by the Postmaster General for transporting mail. If the railroad's eminent domain theory is correct, it would have been entitled to interest from the time of the "taking" which would have been either when the Postmaster General issued authorizations for transporting the mail or when the mail was actually transported, but not when the periodic payments for the service were ordinarily made. The absurdity of attempting to fasten upon the Government a liability to pay interest from either of these points of time, which apparently led to the railroad's lesser claim, furnishes further support for our view that the regulatory and rate-making provisions of the Railway Mail Pay Act do not constitute a taking of private property.

## VI

### **The Major Part of the Claim in Issue Is Barred by the Statute of Limitations**

If, in the circumstances of this case, suit may be brought for a money judgment in the Court of Claims, the railroad's cause of action first accrued



on May 10, 1933, when its application to the Commission for a reexamination of rates was denied. Since the present suit was instituted on February 2, 1942, it follows that the portion of the railroad's claim for the period before February 2, 1936, is barred by the six-year limitation on actions fixed by Section 156 of the Judicial Code, 28 U. S. C. (1946 ed.) 262, now 28 U. S. C. 2501.<sup>26</sup>

The rates here in question were established on July 10, 1928, by an order of the Interstate Commerce Commission. The railroad accepted these rates without protest until April 1, 1931, when it applied to the Commission for a reexamination of the rates.<sup>27</sup> After an investigation and hearing, the Commission, on May 10, 1933, denied the application for increased compensation, holding that the established rates were fair and reasonable. A petition for reconsideration was denied by the Commission on October 3, 1933.<sup>28</sup> Thereafter, in a suit brought by the railroad in the United States District Court for the Southern District of Georgia, an order was entered setting aside the Commission's order and directing the Commission to take

<sup>26</sup> The statute of limitations is jurisdictional in the Court of Claims. *American Standard Ship Fittings Corp. v. United States*, 70 C. Cls. 679. The amended petition, now before the Court, was not filed until December 28, 1944, more than six years after the date of the last claim.

<sup>27</sup> The Act provides that either the Postmaster General or any affected carrier may at any time after the lapse of six months from the entry of the order assailed apply for a re-examination. 39 U. S. C. 553.

<sup>28</sup> No provision is made in the Act for a petition for reconsideration.

further appropriate action. Pursuant to this decree the Commission held further hearings and entered an order on February 4, 1936, adhering to its former rates. On February 28, 1938, this Court held that the action was not properly brought before a three-judge court under the Urgent Deficiencies Act. *United States v. Griffin*, 303 U. S. 226. Four years after this Court's decision, on February 2, 1942, the petition commencing the present action was filed in the Court of Claims. The delay of four years is nowhere explained.

We submit that the issue between the railroad and the Government was clearly defined on May 10, 1933, the date the railroad's application for increased compensation was denied. No further action by the Commission was necessary to fix and define the claim asserted in this action. Thus, the court below (77 F. Supp. 197, 206) erred in holding that the amount of the claim was not ascertainable until February 4, 1936, when the Commission affirmed its prior action after reopening the case in obedience to the decree of a district court which lacked jurisdiction.

The period of limitations prescribed by the statute begins to run when the claim accrued (28 U. S. C. (1946 ed.) 262). Now 28 U. S. C. 2501. "As a proposition of general applicability to the statutory limitations it may be said that a cause of action has not accrued, so as to start the running of the limitation, until such time as suit upon it may

properly be brought.” *Dusck v. Pennsylvania R. Co.*, 68 F. 2d 131 (C. A. 7); *Pettibone v. Cook County, Minnesota*, 120 F. 2d 850, 854 (C. A. 8); *City of Beach v. Goepfert*, 147 F. 2d 480 (C. A. 8); *Yager v. Liberty Royalties Corp.*, 123 F. 2d 44, 47 (C. A. 10). The claim in the instant case accrued on May 10, 1933, when the Commission denied the railroad’s application for increased compensation. Any later action taken by the Commission would be relevant only if the statute of limitations were tolled or a new rate were established thereby. Since the later actions herein taken in no way altered or modified the established rates, they did not affect the amount of the railroad’s claim and did not start the statute running anew. Nor is there any basis for contentions that such actions tolled the operation of the statute.

That the railroad has attempted to obtain relief through other proceedings which failed of success and thus has mistaken its remedy is of no legal consequence. *The L. E. Myers Co., Inc. v. United States*, 105 C. Cls. 459, 478; *Ylagan v. United States*, 101 C. Cls. 294; *John P. Moriarty, Inc. v. United States*, 97 C. Cls. 338; *Pink v. United States*, 85 C. Cls. 121. “The general rule in respect of limitations must also be borne in mind, that if a plaintiff mistakes his remedy, in the absence of any statutory provision saving his rights, or where from any cause a plaintiff becomes nonsuit or the action abates or is dismissed, and, during the pendency

of the action, the limitation runs, the remedy is barred." *Willard v. Wood*, 164 U. S. 502, 523. *Fairclough v. Southern Pacific Co.*, 171 App. Div. 496, affirmed, 219 N. Y. 657; *Sweet v. Electric Light Co.*, 97 Tenn. 252; *American Theatre Co. v. Glas-mann*, 95 Utah 303; *Jones v. Morris Plan Bank of Portsmouth*, 170 Va. 88. It should be noted that any hardship to the railroad caused by the operation of the statute can be ascribed only to its procrastination. If suit had been brought within a year after the decision of this Court in *United States v. Griffin*, 303 U. S. 226 (February 28, 1938), rather than four years later, no defense based upon the statute of limitations could have been raised.

### CONCLUSION

Under the guise of "properly" construing an order of the Interstate Commerce Commission, the Court of Claims has attempted to usurp the functions of the Commission by nullifying the Commission's findings and substituting its own unauthorized ideas of fair and reasonable railway mail rates. The Court of Claims, without justification, has concluded that the approved rates were "confiscatory", despite the fact that its opinion expressly disclaims any finding based on the Fifth Amendment to the Constitution. On the other hand, the railroad claims recovery, with interest, on, the theory of a "taking" under the Fifth Amendment, although the rates are the same as paid to comparable rail-



roads, and although the railroad which brought the suit has successfully resisted any attempt to relieve it from the business of which it complains. There is no valid answer to the Commission's finding that the mail service, per unit, has paid the complaining railroad two and one-half times as much as express service on the same railroad, and about six times as much as passenger service. If the judgment of the Court of Claims is approved, this railroad will be paid almost double the rates paid to any other comparable railroad, and it will receive per mail unit about five times what it received from express service, and almost twelve times per unit what it received from passenger service.

For the reasons set forth herein, it is submitted that the judgment of the Court of Claims is beyond its powers, and, in any event, is not warranted by the law or facts, and should be reversed.

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JANUARY 1949.

## APPENDIX A

The so-called Railway Mail Pay Act of July 28, 1916, 39 Stat. 412, 425-431 provides:

§ 523. *Free transportation for persons in charge of mails.*

Every railroad company carrying the mails shall carry on any train it operates and without extra charge therefor the persons in charge of the mails and when on duty and traveling to and from duty, and all duly accredited agents and officers of the Post Office Department and the Railway Mail Service and post-office inspectors while traveling on official business, upon the exhibition of their credentials.

§ 524. *Conditions of railway service; adjustment of compensation.*

(The Postmaster General is authorized and directed to adjust the compensation to be paid to railroad companies for the transportation and handling of the mails and furnishing facilities and services in connection therewith upon the conditions and at the rates hereinafter provided.

§ 525. *Classes of routes enumerated.*

The Postmaster General may state railroad mail routes and authorize mail service thereon of the following four classes, namely: Full railway post-office car service, apartment railway post-office car service, storage-car service, and closed-pouch service.

§ 526. *Full railway post-office car service.*

Full railway post-office car mail service shall

<sup>1</sup> The section numbers here used are those found in Title 39 of the United States Code.

be service by cars forty feet or more in length, constructed, fitted up, and maintained for the distribution of mails on trains. The authorizations of full railway post-office cars shall be for standard-sized cars sixty feet in length, inside measurement, except as hereinafter provided.

§ 527. *Apartment railway post-office car service.*

Apartment railway post-office car mail service shall be service by apartments less than forty feet in length in cars constructed, fitted up, and maintained for the distribution of mails on trains. Two standard sizes of apartment railway post-office cars may be authorized and paid for, namely, apartments fifteen feet and thirty feet in length, inside measurement, except as hereinafter provided.

§ 528. *Storage-car service.*

Storage-car mail service shall be service by cars used for the storage and carriage of mails in transit other than by full and apartment railway post-office cars. The authorizations for storage cars shall be for cars sixty feet in length, inside measurement, except as hereinafter provided. Storage space in units of three feet, seven feet, fifteen feet, and thirty feet, both sides of car, may be authorized in baggage cars at not exceeding pro rata of the rates hereinafter named for sixty-foot storage cars.

§ 529. *Service by full and apartment railway post-office cars and storage cars.*

Service by full and apartment railway post-



office cars and storage cars shall include the carriage therein of all mail matter, equipment, and supplies for the mail service and the employees of the Postal Service or Post Office Department, as shall be directed by the Postmaster General to be so carried.

§ 530. *Closed-pouch service.*

Closed-pouch mail service shall be the transportation and handling by railroad employees of mails on trains on which full or apartment railway post-office cars are not authorized, except as hereinbefore provided. The authorizations for closed-pouch service shall be for units of seven feet and three feet in length, both sides of car.

§ 531. *Rates of payment for classes of routes.*

The rates of payment for the services authorized in accordance with sections 524-541, 542-568 of this title shall be as follows, namely:

(a) *Full railway post-office car service.*

For full railway post-office car mail service at not exceeding 21 cents for each mile of service by a sixty-foot car.

In addition thereto he may allow not exceeding \$4.25 as a combined initial and terminal rate for each one-way trip of a sixty-foot car.

(b) *Apartment railway post-office car service.* For apartment railway post-office car mail service at not exceeding 11 cents for each mile of service by a thirty-foot apartment car and 6 cents for each mile of

service by a fifteen-foot apartment car.

In addition thereto he may allow not exceeding \$2.75 as a combined initial and terminal rate for each one-way trip of a thirty-foot apartment car and \$2 as a combined initial and terminal rate for each one-way trip of a fifteen-foot apartment car.

(c) *Storage-car service.* For storage-car unit service at not exceeding 21 cents for each mile of service by a sixty-foot car.

In addition thereto he may allow not exceeding \$4.75 as a combined initial and terminal rate for each one-way trip of a sixty-foot car.

(d) *Closed-pouch service.* For closed-pouch service, at not exceeding  $1\frac{1}{2}$  cents for each mile of service when a three-foot unit is authorized, and 3 cents for each mile of service when a seven-foot unit is authorized.

In addition thereto he may allow not exceeding 25 cents as the combined initial and terminal rate for each one-way trip of a three-foot unit of service and 50 cents as a combined initial and terminal rate for each one-way trip of a seven-foot unit of service.

§ 522. *Cars of less than standard lengths; cars of excess length.*

Where authorizations are made for cars of the standard lengths of sixty, thirty, and fifteen feet, as provided by sections 526 and 527 of this title, and the railroad company

is unable to furnish such cars of the length authorized, but furnishes cars of lesser length than those authorized, but which are determined by the department to be sufficient for the service, the Postmaster General may accept the same and pay only for the actual space furnished and used, the compensation to be not exceeding pro rata of that provided by section 531 of this title for the standard length so authorized. The Postmaster General may accept cars and apartments of greater length than those of the standard requested, but no compensation shall be allowed for such excess lengths.

§ 533. *Initial and terminal rates to cover certain expenses; varying allowances for full railway post-office cars, apartment railway post-office cars, and storage cars.*

The initial and terminal rates provided for in section 531 of this title shall cover expenses of loading and unloading mails, switching, lighting, heating, cleaning mail cars, and all other expenses incidental to station service, and required by the Postmaster General in connection with the mails that are not included in the car-mile rate. The allowance for full railway post-office cars, apartment railway post-office cars, and storage cars may be varied in accordance with the approximate difference in their respective cost of construction and maintenance.

§ 534. *Computation of car-miles; railway post-office cars and apartment railway post-office cars.*

In computing the car-miles of the full railway post-office cars and apartment railway post-office cars, the maximum space authorized in either direction of a round-trip car run shall be regarded as the space to be computed in both directions, unless otherwise mutually agreed upon.

§ 535. *Same; storage cars.*

In computing the car-miles of storage cars, the maximum space authorized in either direction of a round-trip car run shall be regarded as the space to be computed in both directions, unless the car to be used by the company in the return movement, or otherwise mutually agreed upon.

§ 536. *Land-grant roads.*

Railroad companies whose railroads were constructed in whole or in part by a land grant made by Congress, on the condition that the mails should be transported over their roads at such price as Congress should by law direct, shall receive only 80 per centum of the compensation otherwise authorized by sections 524-541 and 542-568 of this title.

§ 537. *Style, construction, and maintenance of post-office cars; pay for unsound cars; steel cars.*

All cars or parts of cars used for the Railway Mail Service shall be of such construction, style, length, and character, and fur-



nished in such manner as shall be required by the Postmaster General, and shall be constructed, fitted up, maintained, heated, lighted, and cleaned by and at the expense of the railroad companies. No pay shall be allowed for service by any railway post-office car which is not sound in material and construction and which is not equipped with sanitary drinking-water containers and toilet facilities, nor unless such car is regularly and thoroughly cleaned. The Postmaster General shall not approve or allow to be used, or pay for service by, any full railway post-office car not constructed of steel or steel underframe or equally indestructible material; and all full railway post-office cars accepted for this service and contracted for by the railroad companies shall be constructed of steel.

§ 538. *Facilities for carrying and handling mails; cars at station, station room; offices for employees.*

Railroad companies carrying the mails shall furnish all necessary facilities for carrying for and handling them while in their custody. They shall furnish all cars or parts of cars used in the transportation and distribution of the mails, except as herein otherwise provided, and place them in stations before the departure of trains at such times and when required to do so. They shall provide station space and rooms for handling, storing, and transfer of mails in transit, including the separation thereof, by packages for connecting lines, and such distribution of registered mail

in transit as may be necessary, and for offices for the employees of the Railway Mail Service engaged in such station work when required by the Postmaster General, in which mail from station boxes may be distributed if it does not require additional space.

§ 539. *Selection of trains; carrying on any train.*

The Postmaster General shall in all cases decide upon what trains and in what manner the mails shall be conveyed. Every railroad company carrying the mails shall carry on any train it operates, and with due speed, all mailable matter, equipment, and supplies directed to be carried thereon. If any such railroad company shall fail or refuse to transport the mails, equipment, and supplies when required by the Postmaster General on any train or trains it operates, such company shall be fined such reasonable amount as may, in the discretion of the Postmaster General, be deemed proper.

§ 540. *Service operated by railroad and steamboats.*

The provisions of sections 524-541, 542-568 of the title shall apply to service operated by railroad companies partly by railroad and partly by steamboats.

§ 541. *Transportation required in manner, under conditions, and with service prescribed by Postmaster General; compensation therefor.*

All railway common carriers are hereby re-

quired to transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith.

§ 542. *Interstate Commerce Commission to fix and determine rates and compensation.*

The Interstate Commerce Commission is empowered and directed to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of such mail matter by railway common carriers and the service connected therewith, prescribing the method or methods by weight, or space, or both, or otherwise, for ascertaining such rate or compensation, and to publish the same, and orders so made and published shall continue in force until changed by the commission after due notice and hearing.

§ 543. *Relation between the railroads as public-service corporations and the Government to be considered.*

In fixing and determining the fair and reasonable rates for such service the commission shall consider the relation existing between the railroads as public-service corporations and the Government, and the nature of such service as distinguished, if there be a distinction, from the ordinary transportation business of the railroads.

§ 544. *Procedure for ascertaining rates.*

The procedure for the ascertainment of said rates and compensation shall be as provided in sections 545-554 of this title.

§ 545. *Filing to statement by Postmaster General with Interstate Commerce Commission showing transportation required.*

The Postmaster General shall file with the commission a statement showing the transportation required of all railway common carriers, including the number, equipment, size, and construction of the cars necessary for the transaction of the business; the character and speed of the trains which are to carry the various kinds of mail; the service, both terminal and en route, which the carriers are to render; and all other information which may be material to the inquiry, but such other information may be filed at any time in the discretion of the commission.

§ 546. *Employment of clerical assistance; plan for transportation filed with Interstate Commerce Commission.*

The Postmaster General may employ such clerical and other assistance as shall be necessary to carry out the provisions of sections 524-541 and 542-568 of this title, and may rent quarters in Washington, District of Columbia, if necessary, for the clerical force engaged thereon, and pay for the same out of the appropriation for inland transportation by railroad routes. The Postmaster General shall file with the commission a comprehen-



sive plan for the transportation of the mails on said railways and shall embody therein what he believes to be the reasonable rate or compensation the said railway carriers should receive.

§ 547. *Notice by Interstate Commerce Commission to railroads; answer of railroads; hearings.*

Thereupon the commission shall give notice of not less than thirty days to each carrier so required to transport mail and render service, and upon a day to be fixed by the commission, not later than thirty days after the expiration of the notice herein required, each of said carriers shall make answer and the commission shall proceed with the hearing as provided by law for other hearings between carriers and shippers or associations.

§ 548. *Taking testimony, evidence, penalties, and procedure.*

All the provisions of the law for taking testimony, securing evidence, penalties, and procedure are made applicable.

§ 549. *Classification of carriers by Interstate Commerce Commission.*

For the purpose of determining and fixing rates or compensation hereunder the commission is authorized to make such classification of carriers as may be just and reasonable and, where just and equitable, fix general rates applicable to all carriers in the same classification.

§ 550. *Additional weighing of mails.*

Pending such hearings, and the final determination of the question, if the Interstate Commerce Commission shall determine that it is necessary or advisable, in order to carry out the provisions of sections 524-541 and 542-568 of this title, to have additional and more frequent weighing of the mails for statistical purposes, the Postmaster General, upon request of the commission, shall provide therefor in the manner prescribed by law, but such weighing need not be for more than thirty days.

§ 551. *Orders of Interstate Commerce Commission establishing rate or compensation.*

At the conclusion of the hearing the commission shall establish by order a fair, reasonable rate or compensation to be received, at such stated times as may be named in the order, for the transportation of mail matter and the service connected therewith, and during the continuance of the order the Postmaster General shall pay the carrier from the appropriation for inland transportation by railroad routes such rate or compensation.

§ 552. *Percentage of rates allowed land-grant railroads.*

The Interstate Commerce Commission shall allow to railroad companies whose railroads were constructed in whole or in part by a land grant made by Congress on condition that the mails should be transported over their roads at such price as Congress should by law direct only 80 per centum of the compensa-

tion paid other railroads for transporting the mails and all service by the railroads in connection therewith.

§ 553. *Applications for reexaminations.*

Either the Postmaster General or any such carrier may at any time after the lapse of six months from the entry of the order assailed apply for a reexamination, and thereupon substantially similar proceedings shall be had with respect to the rate or rates for service covered by said application, provided said carrier or carriers have an interest therein.

§ 554. *Powers conferred on Interstate Commerce Commission.*

For the purposes of sections 524-541 and 542-568 of this title the Interstate Commerce Commission is vested with all the powers which it is authorized by law to exercise in the investigation and ascertainment of the justness and reasonableness of freight, passenger, and express rates to be paid by private shippers.

§ 555. *Conveyance under special arrangements in freight trains; rates.*

The provisions of sections 524-541 and 542-568 of this title respecting the rates of compensation shall not apply to mails conveyed under special arrangement in freight trains, for which rates not exceeding the usual and just freight rates may be paid, in accordance with the classifications and tariffs approved by the Interstate Commerce Commission.

§ 556. *Proof of performance of service.*

Railroad companies carrying the mails shall submit, under oath when and in such form as may be required by the Postmaster General, evidence as to the performance of service.

§ 557. *Information from Interstate Commerce Commission as to revenues from express companies; rates for transporting matter other than first class.*

The Postmaster General shall, from time to time, request information from the Interstate Commerce Commission as to the revenue received by railroad companies from express companies for services rendered in the transportation of express matter, and may, in his discretion, arrange for the transportation of mail matter other than of the first class at rates not exceeding those so ascertained and reported to him, and it shall be the duty of the railroad companies to carry such mail matter at such rates fixed by the Postmaster General.

§ 558. *Determination by Interstate Commerce Commission of postal carload or less-rate for transportation of fourth-class matter and periodicals.*

The Postmaster General may, in his discretion, petition the Interstate Commerce Commission for the determination of a postal carload or less-than-carload rate for transportation of mail matter of the fourth class and periodicals, and may provide for and authorize such transportation, when practicable, at such rates, and it shall be the duty of



the railroad companies to provide and perform such service at such rates and on the conditions prescribed by the Postmaster General.

§ 559. *Distinguishing between several classes of matter.*

The Postmaster General may, in his discretion, distinguish between the several classes of mail matter and provide for less frequent dispatches of mail matter of the third and fourth classes and periodicals when lower rates for transportation or other economies may be secured thereby without material detriment to the service.

§ 560. *Return to mails; postal cards, stamped envelopes, and newspaper wrappers.*

The Postmaster General may return to the mails, when practicable for the utilization of car space paid for and not needed for the mails, postal cards, stamped envelopes, newspaper wrappers, empty mail bags, furniture, equipment, and other supplies for the Postal Service.

§ 561. *Same; empty mail bags.*

The Postmaster General, in cases of emergency between October 1 and April 1 of any year, may return to the mails empty mail bags and other equipment theretofore withdrawn therefrom as required by law, and, where such return requires additional authorization of car space, pay for the transportation thereof as provided for herein out of the appropriation for inland transportation by railroad routes.

§ 562. *Weighing mail; computations.*

The Postmaster General may have the weights of mail taken on railroad mail routes, and computations of the average loads of the several classes of cars and other computations for statistical and administrative purposes made at such times as he may elect, and pay the expense thereof out of the appropriation for inland transportation by railroad routes.

§ 563. *Refusal to perform service at rates or methods of compensation provided by law.*

It shall be unlawful for any railroad company to refuse to perform mail service at the rates or methods of compensation provided by law when required by the Postmaster General so to do, and for such offense shall be fined \$1,000. Each day of refusal shall constitute a separate offense.

§ 564. *New and additional service; reduction or discontinuance of service.*

New service and additional service may be authorized at not exceeding the rates provided in sections 524-541 and 542-568 of this title, and service may be reduced or discontinued with pro rata reductions in pay, as the needs of the Postal Service may require. No additional pay shall be allowed for additional service unless specifically authorized by the Postmaster General.

§ 565. *Special contracts for transportation; reports of.*

The Postmaster General is authorized to make special contracts with the railroad com-

panies for the transportation of the mails where in his judgment the conditions warrant the application of higher rates than those specified in sections 524-541 and 542-568 of this title.

*§ 566. Service over property owned by another company; over land-grant companies.*

Service over property owned or controlled by another company or a terminal company shall be considered service of the railroad company using such property and not that of the other or terminal company. Service over land-grant road shall be paid for as provided in sections 524-541 and 542-568 of this title.

*§ 567. Failure to furnish cars or compartments.*

If any railroad company carrying the mails shall fail or refuse to provide cars or apartments in cars for distribution purposes when required by the Postmaster General, or shall fail or refuse to construct, fit up, maintain, heat, light, and clean such cars and provide such appliances for use in case of accident as may be required by the Postmaster General, it shall be fined such reasonable sum as may, in the discretion of the Postmaster General, be deemed proper.

*§ 568. Deductions from pay for reduction in or nonperformance of service.*

The Postmaster General may make deductions from the pay of railroad companies carrying the mails under the provisions of sections 524-541 and 542-568 of this title

for reduction in service or infrequency of service where, in his judgment, the importance of the facilities withdrawn or reduced requires it, and impose fines upon them for delinquencies. He may deduct the price of the value of the service in cases where it is not performed, and not exceeding three times its value if the failure be occasioned by the fault of the railroad company.

R.S. § 3964 (39 U. S. C. 481) provides as follows:

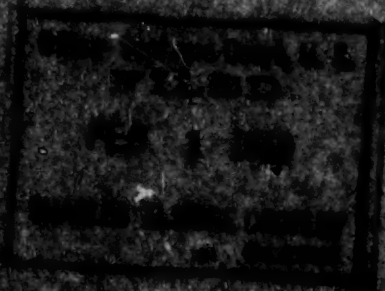
What are post roads.

The following are established post roads:

All railroads or parts of railroads and all air routes which are now or hereafter may be in operation.



LIBRARY  
OF THE  
CONGRESS



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RAILWAY MAIL PAY

IN THE MATTER OF THE APPLICATION OF GEORGIA &  
FLORIDA RAILROAD FOR INCREASED RATES OF  
PAY —

Submitted March 22, 1933. Decided May 10, 1933

UPON REEXAMINATION, RATES PAID APPLICANT FOR  
THE TRANSPORTATION OF MAIL FOUND FAIR AND  
REASONABLE

Moultrie Hitt and G. Kibby Munson for appli-  
cant.

Jennings C. Wise, special assistant to Attorney  
General, and Edwin A. Niess for Postmaster  
General.

REPORT OF THE COMMISSION ON FURTHER HEARING  
DIVISION 5, COMMISSIONERS BRAINERD, PORTER, AND  
FARRELL

By Division 5:

Exceptions were filed by applicant to the report  
proposed by the examiner, and the case was orally  
argued.

By application filed April 1, 1931, the applicant,  
W. V. Griffin and H. W. Purvis, receivers, alleges  
that its rates of pay for the transportation of the  
mails are not fair and reasonable. Applicant  
requests the Commission to reexamine the facts

and circumstances surrounding such transportation and to fix and determine fair and reasonable rates to be received for services rendered on and after April 1, 1931.

The rates paid are those established in *Railway Mail Pay*, 144 I. C. C. 675, effective August 1, 1928. An order for reexamination was entered on May 14, 1931. A test period of 28 days, from September 28 to October 25, 1931, for obtaining space and other data was selected by the applicant and the Post Office Department, hereinafter referred to as the department. In this period the space operated in all passenger train cars was recorded, for passenger proper, including baggage and miscellaneous, express, and mail. Two units of mail service are authorized and used: a 15-foot railway post-office apartment unit and 3-foot closed-pouch units. In the test period 95 percent of the service was rendered in the 15-foot apartment unit, the rate for which is 14.5 cents per mile. The apartment unit is used in each direction, daily between Valdosta and Augusta, Ga., a distance of 222.9 miles, and daily, except Sundays, between Augusta and Tennesse, Ga., 83.3 miles. In the calendar year 1931, apartment service constituted 72.15 percent of the total. The 3-foot closed-pouch service is used under 20 authorizations for hauls of from 8.5 to 56.9 miles. The rate is 4.5 cents per mile. The frequency of this service varies from service on Sundays only to six days per week. The total pay for the calendar year 1931 was \$35,728, exclusive of \$979 for service in motor cars.

Throughout the test period 3,045,704 car-foot miles were operated in passenger-train service for passenger proper, baggage, miscellaneous express,

and mail. This total includes all passenger-train cars, passenger coaches, sleeping and dining cars, and combination and mixed-traffic cars, except motor cars. The distribution of the total among the several services is made in accordance with the plan used in prior cases. The method is described in *Railway Mail Pay, supra*. In this plan, referred to here and in the prior proceeding as plan 2, car-miles and car-foot miles of operation in cars employed exclusively for one service are referred to as full cars, whether loaded or not, and the entire operation of each is allocated to the service to which it is assigned. The space in combination and mixed cars is allocated to each service according to the space used, except that space authorized for mail is regarded as space used. The unused space in such cars is apportioned in proportion to the space used. The results of the allocation and apportionment of the car-foot miles under plan 2 are shown in the following table:

Class of service	Full cars	Combination and mixed cars				Total all cars	
		Used <sup>1</sup>	Per- cent of total used	Appor- tion- ment of unused	Per- cent of un- used	Amount	Per- cent
Passenger proper, includ- ing baggage and miscel- laneous	1,728,382	368,300	49.25	280,456	49.25	2,377,144	78.05
Express		119,603	15.99	91,056	15.99	210,649	6.92
Mail		259,968	34.76	197,943	34.76	457,911	15.03
Total	1,728,382	747,867	100.00	569,455	100.00	3,045,704	100.00

<sup>1</sup> Authorized in case of the mail.

The car-foot miles of service in the test period of 28 days was equivalent to 82.78 percent of the car-foot miles for a 28-day period computed



from the total car-foot miles actually operated throughout the year 1931. The department therefore adjusted the space data to reflect the actual operation for the year. This resulted in a space ratio for mail under plan 2 of 12.96 instead of 15.03. The ratio for passenger, including baggage and miscellaneous, is 80.35 and for express 6.69. The applicant while criticizing the adjustment does not contest it.

The space ratios are applied to the expenses. The ratios of expense so derived are used to apportion investment in road and equipment, except items directly allocated. The direct allocations are relatively small.

For the year ended December 31, 1931, the total operating expenses, railway tax accruals, net equipment and joint-facility rents were \$1,449,801. Of this amount 21.74 percent, or \$315,273, was apportioned to passenger-train service in accordance with the formulas prescribed for class I roads for the separation of expenses between freight and passenger services. Certain expenses were directly allocated to passenger traffic. The remainder was apportioned upon the space ratios as adjusted by the department. The total apportioned to mail was \$40,673. The computed deficit in net railway operating income from mail was \$4,945.

The total investment in road, excluding unrelated items, was \$15,864,462. Of this, 21.44 percent, or \$3,401,578, was apportioned by the department to passenger-train service. The part of the latter amount apportioned to mail upon the adjusted space ratio was \$438,803. The total investment in equipment, less depreciation, allocated

to the passenger-train service was \$135,257, approximately 10 percent of the total. Of this amount \$18,279 was allocated and apportioned to the mail service. The total investment in road and equipment allocated and apportioned to mail was \$457,082. A return upon this computed at 5.75 percent is \$26,282 which, added to the indicated deficiency in net railway operating income from mail of \$4,945, brings the total claim of the carrier for increased compensation to \$31,227. To meet it upon the basis of 1931 operations would require an increase in compensation of 87.40 percent.

The department opposes any increase upon the principal ground that the present rates were established as reasonable for all carriers based upon an examination of the service as a whole. The applicant, however, under the railway mail-pay statute is entitled to show, if it can, upon re-examination that insofar as it is concerned the rates so established are not fair and reasonable. In determining that issue we must take into consideration all factors that have a bearing upon it.

An examination of the data shows that of the three services included in passenger-train service as a whole the mail service makes the best showing with respect to revenue. The total mail revenue of \$35,728 for the year 1931 on a space ratio of 12.96 was only \$594 less than the total revenue from passenger service proper, including baggage, and miscellaneous service, with a space ratio of 80.35. The operating ratio for the entire passenger-train service, including express and mail was 357.43. The distribution of expense

upon the space ratios shows that the operating ratio for mail service was 102.79, as compared with 630.41 for passenger proper, including baggage, etc., and 249.67 for express. In other words, the passenger service proper including baggage and miscellaneous, with a total revenue of \$36,322 showed a computed deficit in net revenue from railway operations of \$192,661; express with a revenue of \$7,593 showed a deficit of \$11,364; and mail with a revenue of \$35,728 showed a deficit of only \$997. The total passenger-train service revenue was equal to 5.86 percent of the total railway operating revenue. The railway operating expense allocated and apportioned to the passenger-train service was 21.33 percent of the total railway operating expense.

The data also show that in the three years 1929 to 1931, inclusive, mail revenues have been relatively more stable than the revenues from the other passenger-train services. In 1929, the revenue from passenger proper, including baggage, etc. was \$111,289, from express, \$21,681, and from mail \$40,904. In 1930, revenue from passenger proper, etc. was \$64,038; from express, \$12,463, and from mail, \$39,087. In 1931, revenue from passenger proper, etc. was \$36,322, from express \$7,593, and from mail, \$35,728. Revenue from passenger proper decreased 67 percent, from express, 64 percent, and from mail, 12 percent.

Passenger revenue from passenger-train service as a whole including express and mail, in 1929, was \$173,874; in 1931, it was \$79,643, a decrease of 54 percent. Allocated and apportioned passenger-train railway operating expenses decreased only 23 percent in the same period, that is, from

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\$370,740 in 1929 to \$284,667 in 1931. The number of car-miles operated in passenger-train service decreased 25 percent in the same period.

The department showed the maximum and minimum number of mail bags, or their equivalent in packages carried outside such bags, handled on any trip, and the average of the maximum and minimum handled in 3-foot closed-pouch units on all trips during the test period. This unit, which is the smallest unit that can be authorized, has a maximum capacity of 56 bags, or the equivalent in outside packages. During the test period the maximum number carried on any one trip ranged from 6 to 27; except in one instance 61 were carried. The average maximum number handled on all trips ranged from 2 to 20, except in the one case referred to where it was 55 upon an authorization on Sundays only, between Tennille and Keysville, Ga., a distance of 56.9 miles. The miles of service per year of this authorization constituted about 4 percent of the total miles of service per year in all the 3-foot closed-pouch units. Miles of service in closed-pouch units for the year 1931 were 27.84 percent of the total miles of mail service. The revenue therefrom was about 12 percent of the total mail revenue. In the test period the relation of service in closed-pouch units to the total was different. In that period only 5 percent of the service was in such units. As shown before, the actual use of the units was considerably below the maximum capacity. The use of authorized space for mail in the space study instead of space actually occupied resulted in a somewhat higher space ratio and the apportionment of greater expense to the mail. In this in-



stance, probably, the difference in the result for the test period would not be great because of the small amount of closed-pouch space in relation to the total in the test period. Applied to operations for a full year, however, the difference probably would be considerable. The 15-foot apartment unit earned by far the greater portion of the revenue. The department states that if the mail-pay rates are increased consideration of economy might compel a discontinuance of apartment-car service where closed-pouch service at lower rates would suffice.

Applicant bases its claim for higher rates upon the space data of the test period and their application in a cost study; and also upon the fact that, because of its low traffic density and low earnings per mile of road, it is not comparable with many class I roads which receive the same rates of pay.

The cost study is not considered to be an accurate ascertainment of the actual cost of service. It is an approximation to be given such weight as seems proper in view of all the circumstances. See *Railway Mail Pay, supra*. The comparison of mail revenue with other revenue received for services in passenger-train operations shows that mail with relation to the other services is bearing its fair share of the expenses of operation and is contributing relatively more than the other services for the space furnished. Applicant receives the same rates as those received by other roads for the same kind of service. Many of these other roads are, as applicant points out, roads which are very much larger and which have greater traffic and lower unit operating costs.

On the other hand many are in much the same situation as the applicant in respect of passenger-train operations. The data submitted fail to justify giving the applicant rates higher than those now paid other railway common carriers for like service.

We find that the rates of pay now received by applicant for the transportation of mail, established in *Railway Mail Pay*, 144 I. C. C. 675, for railroads over 100 miles in length, are fair and reasonable. The application for increased compensation is denied.

An appropriate order will be entered.

No. 9200\*

RAILWAY MAIL PAY

IN THE MATTER OF APPLICATION OF GEORGIA &  
FLORIDA RAILROAD FOR INCREASED RATES OF PAY

Submitted January 9, 1936. Decided February  
4, 1936.

UPON FURTHER HEARING RATES PAID APPLICANT FOR  
TRANSPORTING THE MAIL FOUND FAIR AND REASON-  
ABLE. PRIOR REPORTS, 192 I. C. C. 779 AND 144  
I. C. C. 675

Moultrie Hitt and G. Kibby Munson for appli-  
cant.

Karl A. Crowley and William C. O'Brien for  
Postmaster General.

REPORT OF THE COMMISSION ON FURTHER HEARING

By the Commission:

Exceptions were filed by applicant, Georgia &  
Florida Railroad, to the report proposed by the  
examiner and the proceeding was orally argued.

This proceeding, the prior report in which was  
made by division 5 in 192 I. C. C. 779, was re-  
opened upon our own motion after the United  
States District Court, Augusta Division, South-  
ern District of Georgia, in a suit brought by  
applicant, set aside the order of division 5. That  
order prescribed as fair and reasonable the rates  
now paid applicant for transporting the mail.

Service is furnished by applicant in 15-foot railway post-office apartment units at a rate of 14.5 cents per mile and in 3-foot closed-pouch units at 4.5 cents per mile. —Those rates were prescribed by us in *Railway Mail Pay*, 144 I. C. C. 675, after a general reexamination of the rates of pay for all railway common carriers.

At the further hearing the Post Office Department, hereinafter called the department, put in evidence the detailed rules governing separation of operating expenses between freight service and passenger service in the study of expense for transporting mail on the Georgia & Florida based on a test period of 28 days, September 28 to October 25, 1931. Space and other data included in that study are described in the prior report. No additional tests have been made.

Passenger-car miles in 1934 were 37 percent less than in 1931. Freight-car miles decreased 5.3 percent. Car-foot miles of mail service decreased 7.4 percent, due for the most part to the abandonment of a branch line by applicant. Annual mail compensation decreased \$7,561, approximately 21 percent.

At the prior hearing the parties submitted the final results obtained from the separation of expenses between freight service and passenger service. The amount computed for the latter was apportioned among services rendered in passenger trains, passenger proper including baggage and miscellaneous, express, and mail. The methods employed for the initial division between freight and passenger were explained by the department at the further hearing. The department also showed the result of applying the methods to the



counts in the general account for maintenance of equipment, omitting common expenses in certain accounts which were apportioned upon the same basis as common expense for superintendence.

Transportation (rail-line) expense allocated and apportioned to passenger service totaled \$123,469. The largest single item in this was for fuel for train locomotives, which for the most part was directly assigned to each service according to use. The item for train engine men, \$20,450, was also assigned directly. Common expenses in mixed-train service were apportioned on the basis of car-miles operated in mixed trains, and other common expenses on the basis of the direct assignments.

Expenses for trainmen and train supplies, \$23,219, were similarly allocated and apportioned. Station-employee expenses, \$16,807, were directly allocated where possible and the balance was apportioned according to the percentages used to divide common expenses in the item for "superintendence, transportation, rail line." Common expenses in the latter item were apportioned according to freight and passenger proportions of the aggregate of all primary accounts in the general account for transportation, rail line, omitting certain accounts in which common expenses were apportioned upon the percentages derived from the superintendence account.

Another element of doubt, as to the reliability of the space study as a basis for determining the cost of service, arises from treating the 3-foot units of authorized mail space as the full space used by mail, regardless of the mail load carried. In other mail-pay proceedings the authorized mail

space was also treated as the mail space used but the actual mail load carried was also given consideration in the final ascertainment of reasonable compensation. See *Railway Mail Pay*, 95 I. C. C. 493, 512, 144 I. C. C. 675, 696, 706, 151 I. C. C. 734, 743. The full capacity of a 3-foot unit, which contains 121.5 cubic feet, is 56 bags of mail or the equivalent in packages not carried in bags. The largest number carried during the test period in the 3-foot units on the various trips, including all routes, ranged from 6 to 27 bags, except for service on Sunday only between Tennille and Keysville, Ga., where 61 was the maximum. The average of the maximum loads, however, on all trips, ranged from 2 bags on the Broxton-Douglas route to 20 bags on the Midville to Statesboro, via Graymont route, except on trips between the two points above named, where the maximum was 55 bags. The minimum number carried on any trip ranged from 1 to 6. The average minimum load ranged from one bag on the Tennille-Keysville route to nine bags on the Douglas-Broxton route. The space furnished to meet authorizations for 3-foot units is not set aside for exclusive mail use. The mail sacks and packages are carried with the baggage and express and may actually use more or less than 3 linear feet of car length, depending upon the number and the arrangements for loading and unloading the mail, baggage, and express en route.

The methods used in this, as in all prior railway-mail pay proceedings, to ascertain and compute the proportions of operating expense and the separations into expenses for freight service and passenger service respectively, show that the por-

tion assigned to either service may change due solely to changes in the other. The portion assigned to mail may also change with changes in the passenger and express services, even where there is no change in the mail service. The extent will depend upon the amount of change in the passenger-train expense and the change in the space ratios.

A comparison of revenue received by applicant from the three services rendered in passenger-train service shows that the mail service pays considerably more for equivalent units of service than passenger proper, or express. The units used in this comparison are derived from the space ratios and include proportionate amounts of unused space, without considering the amount and character of such space or the load carried in the 3-foot units.

In passenger-train service operations in 1931, applicant received \$35,728 from mail service for 12.96 percent of the total car-foot miles of service, \$7,593 from express for 6.69 percent, and \$36,322 from passenger proper for 80.35 percent. Revenue per car-foot mile, based upon the above percentages of space, from mail was 5.75 mills, from express 2.36 mills, and from passenger proper 0.94 mills. Upon a computed unit-of-service basis, the amount paid by the department for carrying mail was about two and one-half times as much as the amount received by applicant from carrying express and about six times as much as the amount received for passenger service proper. Mail revenue from 12.96 percent of the total car-foot miles operated was 44.86 percent of the total passenger-train service revenues,

express revenue from 6.69 percent of the car-foot miles was 9.53 percent of the total, and passenger revenue proper from 80.35 percent of the car-foot miles was 45.61 percent of the total.

The foregoing computations are derived solely from the space and revenue studies. They show that in relation to the other services the department pays a considerably greater amount per car-foot mile of service than the carrier receives from other services rendered in the same trains.

The average computed expense per car-foot mile allocated and apportioned to passenger-train service as a whole, including mail and express, based on operations in 1931, was 0.6573 cent. The corresponding figures for passenger, express, and mail, after unused space was assigned to each upon the basis of their space ratios, were respectively 0.658, 0.655, and 0.654 cent. This shows that the expense per car-foot mile assigned in the study to each service, after apportionment of unused space, approximated the average expense per car-foot mile assigned to passenger service as a whole. The average revenue per car-foot mile of authorized mail service was 1.0297 cents which was 56 percent in excess of the average computed expense for passenger-train service as a whole for all space operated.

Investment in road and equipment allocated and assigned to passenger-train service as a whole in the same study was \$3,536,834. A return on this, based on 5.75 percent as used by applicant, would be \$203,367. The car-foot miles of service in the year 1931 based on the department's adjusted figures amounted to 47,965,379. The average return on investment per car-foot mile



operated, therefore, would be 0.424 cent. The average computed expense per car-foot mile plus this return would be 1.0813 cents. The return at the same rate computed for the mail service as previously shown was \$26,282. On the basis of 6,216,313 car-foot miles allocated and apportioned to mail for the year 1931, the return would be 0.422 cent per car-foot mile. This return, plus the apportioned expenditures, amounts to 1.076 cents. Revenue per car-foot mile from authorized mail space was 1.0297 cents which is 0.0516 cent or 4.7 percent less than the hypothetical expense per car-foot mile of passenger-train service as a whole plus the stated return.

Comparison of the revenue per authorized car-foot mile of mail service with the average expense plus the stated return for passenger service as a whole, and with the similar figure for mail service, does not take into consideration any distribution of mail revenue to unused space apportioned to the mail. Whatever distribution be made, the amount assigned to mail service would decrease the mail revenue per car-foot mile. The comparison is made, however, in view of the small amount of mail carried in the authorized units. It indicates that revenue per car-foot mile from the authorized space approaches quite closely the full hypothetical cost per car-foot mile plus the stated return both for mail service and for passenger-train service as a whole.

The record shows that mail in the 15-foot apartment service was handled en route by post-office clerks, and that mail in the 3-foot authorizations was handled on the trains by railroad employees. The latter service in 1931 constituted

27.85 percent of the total mail service and furnished 12 percent of the mail revenue. The record also shows that the average maximum mail load in the 3-foot units, except over the one run previously mentioned, ranged from 2 to 20 bags or outside packages, which was below the maximum load of 56 bags or the equivalent in packages. If adjustment in the computed data were made to reflect the actual use of the 3-foot units, the actual car-foot miles of mail service probably would be less than the authorized and the unit revenue per car-foot mile from mail would be somewhat greater. Expense of transporting mail per authorized car-foot mile, in view of the service rendered by applicant on its trains in connection with it, might reasonably be considered to be somewhat less per car-foot mile than for passenger-train service as a whole.

The matters disclosed in the original hearing upon this application, and considered by division 5 in its prior report, have been carefully considered by us in this reopened proceeding. We have had the benefit of additional testimony in respect of the conditions under which the authorized 15-foot railway post-office apartment is furnished, of a more comprehensive analysis by the department of the underlying data upon which the space and cost studies were made, and of a more detailed examination of the space data, the revenues per car-foot mile and expenses per car-foot mile as related to passenger-train operations as a whole and to each of the three services rendered in that operation.

Giving consideration to all the computations, the extent and cause of the operation of a substan-

primary operating accounts for the year 1931. Additional analyses of the data were furnished by the department and the applicant.

The main question presented by the department at the further hearing is the extent to which the cost study discloses the cost of performing mail service. The basic operating data representative of actual operations by applicant are furnished by the space study. The method, called plan 2, used by the parties in distributing space in combination and mixed-traffic cars is the same as that employed in prior mail-pay proceedings. The department, as in those cases, presented results obtained by applying two other plans, termed plans 1 and 3, which, it contends should be given consideration in determining reasonable rates of mail pay, particularly where, as here, the operations of a single railroad are under reexamination. Those plans were described in *Railway Mail Pay*, 144 I. C. C. 675; 681, 689, and will not be further discussed here.

Plan 2 allocated directly to each class of service the car-foot miles of service in cars operated exclusively for each class. Car-foot miles of service in passenger and mail apartments which are parts of cars partitioned from the remainder of the car were also directly allocated to the respective services. Car-foot miles of occupied space in the remainder of the apartment car, referred to as the baggage end, and in mixed-traffic cars which have no separate apartments, were allocated to the service occupying such space. Unoccupied space in the baggage end of combination cars and in mixed-traffic cars was apportioned among passenger, express, and mail services in

proportion to the occupied, or used, space in such cars. Space authorized for mail was considered to be the occupied or used mail space regardless of the extent it was actually used. Space occupied by passenger and express services in such cars was measured at certain points on the railroad where the load carried for each service was considered to represent an average for the whole route. Neither the first nor the last part of the run was taken. The average space thus measured was used in computing the total car-foot miles occupied by each such service for the run of the car. Every car was measured on the car runs at least once, and in some instances more, where the runs were long.

In the test period, 3,045,704 car-foot miles were operated in passenger-train service. The distribution of this made by applicant to the three services, in the manner described, resulted in final space ratios as follows: Passenger proper, including baggage and miscellaneous, 78.05 percent, express 6.92 percent, and mail 15.03 percent. The total expenses allocated and apportioned to the passenger-train service as a whole for the year 1931 was \$315,272. Of this, \$1,295, or 0.41 percent, was directly assigned to passenger service. The remainder, \$313,977, was regarded as expense common to the three services and was apportioned among them by applying the space ratios of the test period. In this distribution, 15.03 percent or \$47,191 was apportioned to mail service.

Investment in road and equipment allocated and apportioned to passenger-train service by applicant for the year 1931 was \$3,554,377. The amount apportioned to mail by using the mail



space ratio of 15.03 percent was \$534,223. Applicant computes a return on this amount, at 5.75 percent, of \$30,718. The expense plus the stated return equals \$77,909. The mail revenue for 1931 was \$35,728. The additional revenue required based upon these figures would be \$42,181, or an increase of 118 percent.

The computations rest upon the space ratios of the test period applied to the expenses of the entire year of 1931. The department showed that the car-foot-mile figures of the test period extended to one year were only 82.78 percent of the actual car-foot miles operated in that year. The car-foot-mile figures were obtained from the car-miles actually operated in that year as reported by applicant, multiplied by the average length of each class of car operated. The actual car-foot miles of mail service operated in 1931 and paid for were deducted from the total car-foot miles and the balance was apportioned among passenger, express, and unused space upon the ratios of those services and of unused space obtained in the test period, no other ratios or operating data being available. As a final result of this adjustment the department derived, under plan 2, a space ratio for mail of 12.96 percent instead of 15.03 percent.

The application of a mail-space ratio of 12.96 percent to the computed expenses of the passenger-train service resulted in a computed mail expense of \$40,673 or \$6,518 less than the amount first computed. This adjustment is not contested by applicant.

The department's exhibits showed applicant's investment in road and equipment allocated and

apportioned to passenger-train service as, \$3,536,834, or \$17,534 less than applicant's figures. Under plan 2 this was apportioned among the three services upon the ratios of total railway operating expenses allocated and apportioned. These ratios were substantially the same as the space ratios, the mail-expense ratio, for example, being 12.90 percent and the space ratio 12.96 percent. The total mail-service investment thus derived was \$457,082. A return of 5.75 percent upon this sum amounted to \$26,282 which, with the computed expense, brought the total claim for increased compensation to \$31,227, to meet which would require an increase of 87.4 percent in the rates now paid.

The mail operating expenses resulting from the department's adjusted figures totaled \$36,725. Dividing that amount by the mail operating revenue of \$35,728 produces a mail operating ratio of 102.79. The court, which set aside the prior order herein, referred, among other things, to that ratio. Applicant on brief in the instant proceeding in discussing the court's opinion states as follows:

It may be well to emphasize that it was particularly pressed upon the Court's attention by counsel for both sides \* \* \* that the cost study did not purport to be mathematically exact, so the Court's language is not properly to be discounted by any impression that the Court was not apprised of the nature of the cost study. It seems to the applicant quite obvious, both from the context of the Court's opinion, and the arguments to the Court, that the Court meant that, taking it for exactly

what it was; the cost study indicated that for every dollar applicants received for transportation of mail they expended one dollar and 2.79 cents. The Court's finding was certainly an adjudication that the rates of pay heretofore established were totally inadequate, and is authority for further consideration by the Commission and the establishment of substantially increased rates.

There is implicit in the statement quoted, and in the corresponding portion of the opinion referred to, the assumption that if the department discontinues mail service on applicant's trains the applicant will thereby be saved the expenditure of \$1.0279 for every dollar of revenue it thus loses. Considering the character of the expenses included in the study it is clear that no such saving could be made. The importance of the operating-ratio figure has been overemphasized. Relative costs derived from a series of studies of expenditures for operations common to a number of services cannot be converted into absolute costs by using a single-figure relation derived from such studies.

The cost computed in the manner described is a hypothetical cost and not an actual cost, and is not necessarily conclusive as applicant contends. In other mail-pay proceedings, in which space authorized and paid for was found to be the space that should be charged to mail in cost studies similar to that here, consideration was given to other factors as well, such as the amount and character of the unused space reported as operated (*Railway Mail Pay*, 85 L. C. C. 157, 170, 123 L. C. C. 33, 39); the actual space occupied by mail,

as distinguished from authorized space, determined by the mail load carried, based upon a count of bags and of packages outside of bags, and, in some instances, by the weight [*Railway Mail Pay*, 95 I. C. C. 493, 500, 511, 120 I. C. C. 439, 446]; comparisons with compensation received from other services in passenger-train cars (*Railway Mail Pay*, 144 I. C. C. 675, 706); comparisons with freight rates (*Railway Mail Pay*, 144 I. C. C. 675, 705, 151 I. C. C. 734, 742); comparisons per car-mile and per car-foot mile of the computed cost of mail service and the revenue from authorized mail service with the computed cost of corresponding units in passenger-train service as a whole (*Railway Mail Pay*, 144 I. C. C. 675, 699); and the character of the service performed in connection with transporting the mail (*Railway Mail Pay*, 56 I. C. C. 1, 8, *Electric Railway Mail Pay*, 58 I. C. C. 455, 464, 98 I. C. C. 737, 755).

From the relation of the test-period space data to the actual car-miles operated in the year 1931, it is clear that the test-period ratios cannot be applied to the total operating expenses of that year without an arbitrary adjustment to reflect the actual operations for the year. Other evidence at the further hearing discloses also that the space data of the test period cannot be accepted as an accurate guide to an ascertainment of cost, particularly in connection with the operation of the 15-foot railway post-office apartment.

At the further hearing the department showed that applicant operated and continues to operate a 30-foot railway post-office apartment to fill the authorization for a 15-foot apartment. In the



space study the extra 15 feet of space was added to unoccupied space in the combination car and apportioned to all services, including mail, upon the basis of space used. The operation of the 30-foot apartment is for applicant's convenience. It results in the operation of an amount of unused space equal to the authorized 15-foot apartment and thus increases the amount of space and the expense apportioned to mail. The apartment car is operated between Augusta and Valdosta, Ga., 222.9 miles daily in each direction. In the year 1931 a 15-foot railway post-office apartment service was authorized daily except Sundays between Augusta and Tennille, Ga., 83.3 miles. The latter service was discontinued in October 1934, due to the abandonment of the branch line between McAdoo and Tennille Junction, Ga. A 15-foot mail apartment of standard size and specifications provides storage space of approximately 3.2 linear feet, sufficient to carry 50 sacks of mail. In a standard 15-foot apartment no restriction is placed upon the number that may be carried, if the space permits more. Where, however, an oversized apartment is furnished, as in the case here, the use of the 15-foot authorized space is limited to 50 sacks in the storage portion. The mail clerks are required to keep record of all sacks and packages handled when the oversized apartment is furnished, but not when a 15-foot apartment is furnished. The use of distribution facilities in the apartment is limited to the amount provided in 15-foot apartments. The department does not, and may not, make any use of the extra 15 feet furnished. An inspection of the 15-foot apartment service made in March 1935 disclosed

that the distribution facilities and the storage space used did not average over 50 percent of the space available in such a unit. There was no evidence as to the average use in the test period or in the year 1931.

The car in which the 30-foot apartment is operated is 55 feet in length. Space outside the apartment is used for baggage, express, and miscellaneous traffic. In the space study, the 15 feet of unused space in the oversize mail apartment was added to the total unused space in the combination and mixed-traffic cars and apportioned among mail, express, and passenger services in proportion to the space used in such cars. This was done, apparently, upon the theory that if the apartment had been changed to a 15-foot apartment, the remainder of the 30-foot apartment would have been unused and that, therefore, the mail would have been charged, in the space study, with the same proportionate amount. The assumption, however, rests upon the further assumption that the average measured space reported as used by express and by baggage and miscellaneous services would have been the same.

The total space operated in combination cars in the test period, using the adjusted figures computed by the department, was 1,481,016 car-foot miles. Used space reported in the manner previously described totaled 826,703, and unused space 654,313, car-foot miles. The total unused space constituted 44 percent of the total operated. The authorized mail space was 266,175, which was 32.19 percent of the total space in combination cars reported as used. Upon this ratio, mail was apportioned 210,623 car-foot miles of the unused

space. Of the total space allocated and apportioned to mail, 44 percent resulted from apportionment of unused space. The amount of unused space due to the operation of the 30-foot apartment in lieu of a 15-foot apartment was 247,101 car-foot miles and the share of this apportioned to mail was 79,541 car-foot miles. If this amount were eliminated from the total apportioned to mail and assigned to the other services upon the assumption it was and is unnecessarily operated insofar as mail is concerned, an assumption justified upon this record, the mail-space ratio would be reduced to 10.79 percent and the computed mail expense would be reduced to \$34,017 or \$1,711 less than the revenue. This is 27 percent less than the expense computed from the unadjusted test-period data and 16 percent less than that computed by the department upon its adjusted data. The analysis of the space data, its adjustment to reflect operations for a full year, the adjustment of the space ratio upon the assumption that the operation of an oversize apartment causes the operation of unused space of which no part should be charged to mail, show that the computed cost is not an actual but a hypothetical cost.

The method by which total expense for passenger-train service was computed also results in a hypothetical and not an actual cost. It was obtained from direct allocations and from a series of apportionments of expenses common to freight and passenger services. The methods are the same as those provided in our rules governing separation of such operating expenses on large steam railroads.

The total amount of railway operating expenses thus charged to the passenger service was \$284,667. This is derived from a large number of separate expense items. One or two examples will illustrate the methods used in computing it.

Track expense for passenger service, \$64,978, made up of some 15 items, includes maintenance of tracks in yards and in road service. Maintenance in yards with separate switching service used in common by passenger and freight was divided in proportion to the switching-locomotive miles for each service in such yards. The yard switching-locomotive miles were computed at the rate of 6 miles per hour for the time actually engaged in each service. Maintenance expense of all other tracks was apportioned according to the proportion of expense computed for each service in the division of expense in the item for fuel used for train locomotives. The latter expense item for the most part is assigned directly to each service for the fuel consumed.

Maintenance-of-equipment expenses, \$58,725, was allocated directly according to the assignment of locomotive and cars, where exclusively assigned to one service. The common expenses were apportioned. Where locomotives were not run exclusively in one service the expense for repairs of each locomotive or class was divided according to the mileage operated in each service. Repair expenses for yard locomotives were divided according to the freight and the passenger yard switching-locomotive miles. Common expense under the item for superintendence was apportioned according to freight and passenger proportions of the aggregate of all primary ac-



## **OPINION BELOW.**

The opinion of the Court of Claims (R. 36) is reported at 77 Fed. Supp. 197.

The judgment of the Court of Claims was entered April 5, 1948 (R. 50). The jurisdiction of this Court is invoked under the Act of February 13, 1925, C. 229, Section 3, 43 Stat. 939, as amended May 22, 1939, C. 140, 53 Stat. 752, 28 F. S. C. A. 288.

## **STATEMENTS OF THE CASE.**

### **Inaccuracies and Omissions in the Petitioner-Defendant's Statement.**

The petitioner-defendant, by numerous inaccuracies and omissions in its "Statement" and in its "Reasons Why the Writ Should be Granted", has failed to give this Court a fair and correct statement of the case, therefore, in order to more accurately inform the Court as to the material facts and material issues, the respondent-plaintiff respectfully presents the following counter statement:

### **Respondent-Plaintiff's Counter Statement.**

To save duplication the respondent-plaintiff refers to its previous statement of the case in its counter petition in Case No. 198, filed August 5, 1948, in which the paragraphs are numbered (1) to (10); to which the following supplemental paragraphs are now added:

(11) The said Railway Mail Pay Act made it the duty of the Interstate Commerce Commission to determine upon the basis for the transportation of the mail by railroad common carriers; and to prescribe just and reasonable rates therefor to compensate the carriers for the compelled taking of their property and services (Finding 3, R. 14).

(12) After an elaborate nation-wide investigation in the first general railway mail pay case in which the Postmaster

General and a Committee of Class 1 carriers co-operated (Finding 7, R. 16), the Commission in a report and order dated December 29, 1918 (54 I. C. C. 1) adopted the space basis and set the pattern for determining and fixing rates of compensation by means of joint cost studies (Findings 7 and 8, R. 16, Finding 9, R. 17), and (Finding 10, R. 17), to which basis and pattern it has since generally adhered (Finding 11, R. 19, Finding 12, R. 19, Finding 13, R. 19).

(13) In establishing the general pattern the Commission classified the steam carriers into two major groups, viz.:

(a) The first group consisted of steam carriers over 100 miles in length (Finding 9, R. 17, Finding 10, R. 17) regardless of enormous differences between them. Most of the carriers in this first group are termed Class 1 railroads because they derive from their operations gross railway revenues of one million dollars or more per annum. They range in size from light traffic lines with a gross of barely over one million and a net deficit to others of heavy traffic density with a gross of more than a hundred million dollars and substantial net earnings,<sup>2</sup> (Trans. in 63 (1937) side folio numbers 143, 146, 147, 322, 323; and Pl. Ex. 24, R. 153).

<sup>2</sup> *Statement by counsel for Post Office Department:*

"Mr. Niess. I just wish to remark that in fixing the rates of pay for the transportation of mail by steam railroads in the large mail pay case the Commission arbitrarily divided the roads into classes according to their length, and this road falls into Class 1. In fixing the rates for that class the Commission did not try to give a profit to every road, but they were obliged to use an average. It happens, unfortunately, that this road is below the average, and, therefore, not making a profit.

"Mr. Examiner, in respect to this exhibit, we will not oppose its receipt for what it may be worth. I wish to call your attention to the fact that they are all over 2,000 miles long, the largest trunk lines in the country and not properly comparable with the line of the size of the Georgia & Florida Railroad. (Test. pp. 9033, 9043.) They also receive the same rates of mail pay." (Trans. in 63 (1937) side folio 144, 146.)

96) The second group consisted of independently operated steam-carriers less than 100 miles in length subdivided into two groups, with the dividing line between them drawn arbitrarily at 50 miles regardless of any other differences (Finding 10, R. 17, 18).

(14) Compensation to the carriers at rates for each different size of space units fixed by the Interstate Commerce Commission has been determined upon a *lumped average* of the cost studies for all the steam carriers in the respective major groups (Finding 10, R. 18).<sup>1</sup>

(15) The Georgia & Florida Railroad operated by the plaintiffs is a victim of anomalous classification. It is a very weak carrier. (Trans. in 63 (1937) folio 133; and Finding 2, R. 13; and *Georgia & Florida Reconstruction Loan*; 184 L. C. C. 332, 340); and in poverty, thinness of traffic, with consequently high unit costs, and in nearly every other general characteristic, the Georgia & Florida is similar to most short lines in the second group. However, because its length exceeded 100 miles it was classified for compensation with the first group at same unitary rates derived from the lumped average costs of the comparatively low unit costs of the largest systems with the heaviest traffic density (Trans. in 63 (1937) folio 323, and Finding 10, R. 17, 18).

<sup>1</sup> Carriers in the second group are termed Class II carriers if they have gross railroad operating revenue of more than one hundred thousand but less than one million dollars. If they have gross railway operating revenues of less than one hundred thousand, they are termed Class III carriers. Mileage alone is the sole factor which determines the grouping of lines less than one hundred miles in length, irrespective of whether they are Class II or Class III carriers.

<sup>2</sup> The difference between the levels of the respective scales of unit rates for lines in the first group over 100 miles in length, and those of lesser length in the second group, is very substantial (Finding 10, R. 17, 18; (Finding 13, R. 19, 20), but the rates ordered for each carrier fixed upon the lumped average of the cost studies for each are the same for all carriers in that group regardless of whether the result to individual carriers is compensatory or confiscatory (Finding 10, R. 17, and Trans. in 63 (1937) folio 38, 39).

(16) In the second general Railway Mail Pay Case, decided July 10, 1928 (144 L. C. C. 675) the Commission, relying on the results of cost studies of the same kind previously approved by it, found that the lumped average of the cost studies for roads in the first group indicated the need for an increase of 26.61 per cent, but it awarded them only 15 per cent. For carriers in the second group, the lumped average indicated the need for an increase of 91 per cent, but it awarded them 80 per cent. However, for the Georgia & Florida Railroad the separate cost study indicated the need for an increase of 78%, but the Commission by again lumping the Georgia & Florida with the first group, Class 1, only awarded it the latter's average increase of 15 per cent. (Finding 13, R. 19, 21).

(17) That aforesaid increase of July 10, 1928, resulted in a rate for the Georgia & Florida for a 15 ft. Post Office apartment (pictured by Pl. Ex. 19, R. 145) of only 14½ cents per mile as compared with 27 to 34 cents for comparable weak lines under 100 miles in length; and, for 3 ft. closed pouch service, only 4½ cents per mile for the Georgia & Florida as against 8 cents to 10 cents for comparable but shorter lines (Finding 13, R. 20).

(18) The petitioner-defendant is in opposition to any greater compensation for the Georgia & Florida, despite the fact that in the separate proceeding instituted April 1, 1931, the Commission found that the cost study showed the need for an increase of 87.40% (192 L. C. C. 779, 214 L. C. C. 66, Finding 16, R. 22, Finding 18, R. 25, and finding 23, R. 27).

(19) In its petition to this court for writ to review the judgment of the Court of Claims, the petitioner-defendant has reversed its previous position in *U. S. v. Griffin, supra*, in now contending that mail pay compensation is a matter of legislative rate making.



## THE QUESTIONS PRESENTED.

On page 2 of the defendant's petition it is represented that there are four questions, as follows:

1. Whether the Court of Claims has jurisdiction to increase the rates of compensation fixed by the Interstate Commerce Commission under the Railway Mail Pay Act of July 28, 1916 which provides that the Commission, after notice and hearing, shall "fix and determine . . . the fair and reasonable rates and compensation for the transportation of such mail matter".

2. Whether respondents have failed to exhaust their administrative remedy by bringing suit without requesting the Postmaster General to make a special contract for the transportation of the mails; as authorized by the Act, "Where in his judgment the conditions warrant the application of higher rates" than those provided under the Act.

3. In the event there is jurisdiction in the Court of Claims, whether the scope of review permits the substitution of the court's judgment as to what constitutes fair and reasonable rates for that of the Interstate Commerce Commission.

4. Whether fair and reasonable rates and compensation for transporting mail must, as a matter of law, include compensation for the cost to the railroad of operating unusual amounts of unused space in cars carrying mail."

However, on page 17 of the petition, under the heading "Reasons For Granting the Writ", it is represented that:

"This case presents the question whether orders of the Interstate Commerce Commission fixing, after notice and hearing, the rates of compensation at which common carriers by rail shall carry the United States mails are reviewable in the Court of Claim at all, and, if so, the extent to which they are reviewable;" and that

"This question has not heretofore been presented to this Court and should be resolved at this time because of the importance of settling the reviewability of railway mail pay rate orders."

tial portion of the unused space, the fact that a theoretical cost and not actual cost is derived from the methods and plans adopted, and the small amount of mail carried in the authorized units of service, we find upon this augmented record that the present rates for transportation of the mail by the applicant are fair and reasonable.

An appropriate order will be entered. .

Commissioner Porter dissents. Commissioners Tate and Caskie did not participate in the disposition of this proceeding.



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**NO. 135**

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**NOV 17 1948**

**CHARLES ELSON CLARKE**

**IN THE**

**Supreme Court of the United States**

**OCTOBER TERM, 1948.**

**THE UNITED STATES OF AMERICA, *Petitioner,***

**v.**

**WILLIAM V. GRIFFIN AND HUGH WILLIAM PURVIS, RECEIVERS  
FOR GEORGIA & FLORIDA RAILROAD.**

**BRIEF IN OPPOSITION TO PETITION FOR WRIT OF  
CERTIORARI TO THE COURT OF CLAIMS.**

**MOULTRE HITT,**

**Attorney for Alfred W. Jones,  
Receiver, and William V. Griffin  
and Hugh William Purvis, Re-  
ceivers for Georgia & Florida  
Railroad,**

**601 Tower Building,  
Washington 5, D. C.**





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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1948.

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No. 135.

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THE UNITED STATES OF AMERICA, *Petitioner*,

v.

WILLIAM V. GRIFFIN AND HUGH WILLIAM PURVIS, RECEIVERS  
FOR GEORGIA & FLORIDA RAILROAD.

---

**BRIEF IN OPPOSITION TO PETITION FOR WRIT OF  
CERTIORARI TO THE COURT OF CLAIMS.**

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Alfred W. Jones, Receiver, succeeding William V. Griffin and Hugh William Purvis, Receivers, for Georgia & Florida Railroad, prays that the petition of the Solicitor General, on behalf of the defendant United States, in No. 135, October Term, 1948, to review the judgment of the United States Court of Claims, entered on April 5, 1948, in the case then entitled "William V. Griffin and Hugh William Purvis, Receivers for Georgia & Florida Railroad v. The United States," be denied.



court are so at variance with the evidence as to constitute an error of law, which ought to be reviewed. *The petitioner defendant employs this same strategy in its "Statement".*

Passing by the question as to whether the petitioner's strategy complies properly with the letter and spirit of the court rules which seem to contemplate that each question for consideration should be brought forward specifically by an appropriate specification of error, the respondent respectfully submits that the petitioner's apparent charge that the judgment is at variance with the evidence is not justified. To demonstrate that proposition beyond any doubt, the following detailed analysis of each proposition which petitioner asserts is presented:

**PROPOSITION 1: That the Court below held that fair and reasonable rates must be determined by application of a particular formula which compelled compensation for abnormal amounts of unused space not devoted to the transportation of the mail (p. 29).**

The respondent respectfully submits that the lower court said no such thing. What the court really said was:

"What we do find is that, on the facts as found and stated by the Commission, there is an erroneous conclusion of law by the Commission that plaintiffs have been fairly and reasonably compensated for their mail service.

The so-called "computed" cost being the only cost that can be used, it must be fairly and reasonably computed. To what extent it approaches a fair and reasonable cost not in excess of actual cost is a matter not yet within the ability of the Commission to determine. It is a question that must be answered by good judgment, by those peculiarly fitted and equipped to ascertain the requisite facts as to such cost and exercise that judgment. Congress has chosen the Interstate Commerce Commission to perform that function, and it has done so.

As the Supreme Court has said, this Court has jurisdiction to render judgment of recovery for an amount sufficient to constitute fair and reasonable compensation under the facts as found by the Commission, and paid through failure of the Commission, because of an error of law, to order payment thereof.

Under finding 16 herein, it is shown that the Interstate Commerce Commission found and determined that plaintiff would require an increase in its mail revenue of 87.4% in order to secure for itself, under Plan 2 adopted by the Commission, a return of 5.77% theretofore fixed by the Commission, on its investments in road and equipment engaged in mail traffic. This determination was based on the calendar year 1931 test period. The Commission's findings were determined upon an apportionment of passenger equipment used for mail traffic on the basis of space hired or required for carrying the mail.

Railroad expenses are not generally applicable as direct costs but require apportionments. The Commission did not, under Plan 2, which it adopted and which we must accept, determine actual costs of various operations." (R. 43.)

In view of the record presented the basis employed by the Interstate Commerce Commission, that is to say, Plan No. 2, appears to be fair and reasonable. The studies made are in no wise shown to be out of line with the then state of the art, science, or profession of statistical analyses and cost accounting.

The deficit found in plaintiffs' mail operations was ascertained according to the formula suggested by the Government and used by the Commission to prescribe rates for general application. As we have pointed out, the ascertainment of fair and reasonable compensation must proceed from a fair and reasonable basis." (R. 46.)

**PROPOSITION 2:** That the lower court "Erroneously assumes that the Commission had adopted Plan 2 as the proper method of determining mail cost and investment"—but the Commission had clearly rejected Plan 2 as a single criterion for determining compensation. — (p. 27.)

The respondent respectfully submits that the lower court made no such assumption. Its findings, and its opinion, show clearly that it clearly understood the nature of Plan 2 as a part of the cost study; and also that they knew full well that the Commission had rejected the result of the cost study, as well as the reasons why the Commission did so. All that is fully evident both in the very careful and comprehensive findings of fact, and in the following quotation from the Court's opinion in the light of those factual findings:

"The Commission's decision of May 19, 1933, 192 I. C. C. 773, states its position with reference to plaintiff's claim as follows:

"The cost study is not considered to be an accurate ascertainment of the actual cost of service. It is an approximation to be given such weight as seems proper in view of all the circumstances. See *Railway Mail Pay*, supra. The comparison of mail revenue with other revenue received for services in passenger train operations shows that mail with relation to the other services is bearing its fair share of the expenses of operation and is contributing relatively more than the other services for the space furnished. Applicant receives the same rates as those received by other roads for the same kind of service. Many of these other roads are, as applicant point out, roads which are very much larger and which have greater traffic and lower unit operating costs. On the other hand many are in much the same situation as the applicant, in respect of passenger train operations. The data submitted fails to justify giving the applicant rates higher than those now paid other railway common carriers for like service."

We quote rather than paraphrase this, for what it says is important. We are of the opinion that the "approximation" should be given greater weight than the Commission affords it, because, as we have said, and the Commission in effect admits, there is no such thing as certainty in actual cost. "Approximate, or as it is called "computed" cost must be relied upon, and as a matter of law must be decisive. There is no alternative, at least no satisfying alternative. Of course, there were other methods of computing cost, but the Commission, put to the choice, selected Plan No. 2. And it did not, in the decision of May 10, 1933, abandon Plan No. 2 and select another.

The fact that the plaintiff's railroad "receives the same rates as those received by other roads for the same kind of service" is not responsive to the plea that those rates, as to the plaintiffs, are confiscatory. The service is compulsory, economy and efficiency of operation are undisputed. This is not a case where the carrier may cut down its expenses and thus convert the remuneration into one that is fair and reasonable. It has already reached the efficient and economical stage, and if it must carry the mail, the remuneration must fit that situation. Here it has not done so. (R. 46).

**PROPOSITION 3:** That the Commission had pointed out that the results of the cost study was not an accurate ascertainment of the actual costs of service, but was merely an approximation to be given such weight as seems proper in view of all the circumstances. (p. 27)

The respondent again respectfully submits that the special findings of fact well show that the lower court fully and correctly understood the nature of the cost study. The court discussed this proposition very clearly, and in its opinion, among other things, said:

"A deficit in net railway operating income from the carrying of the mail is, on its face, confiscatory. That must be conceded. It is a simple proposition that needs



no support and must be accepted as obvious. But, if we correctly read the decision of the Commission in the plaintiffs' case, reported in 1924 L. C. C. 779, supra, the Commission's position is that the deficit of \$1.47 is a 'computed' deficit, not necessarily an actual deficit, and therefore not to be taken as 'confiscatory', although the Commission does not use that term.

The trouble with this argument is that a deficit in net railway operating income from mail is always necessarily 'computed'. Actual loss or actual deficit in such income is an ignis fatuus. This must be so until the method of arriving at a deficit receives authoritative if not common acceptance. The Postmaster General himself proposed three alternative plans, which itself indicates lack of an absolute rule. (R. 42)

At a hearing on this case by a commissioner of this court February 18, 1946, a witness for the defendant, the Chief of Section, Cost Section of the Bureau of Transport Economics and Statistics, who was acknowledged in Senate Document No. 63 as especially contributing in the preparation of the cost study, stated, in response to a direct question as to whether the present cost formulae were much better than the cost formulae used by the Commission in 1928 or 1931:

"Well, in 1928 and 1931 the Commission did not have really any cost formulae. They still haven't got any cost formulae, but the Cost Section was formulated to the express purpose of determining cost formulae for that they might be used by the Commission in gathering costs and might be distributed to the carriers so they would have means and procedures for gathering those costs."

We thus see that ascertainment of 'actual' as applied to plaintiffs' cost in the transportation of the mail, had no prospect of realization. The cost had to be a 'computed' cost in any event. But had we the actual cost it would serve only as a guide, a cost to be considered, but not necessarily to govern, in arriving at fair and reasonable compensation. The question is, rather: What is the fair and reasonable cost? For we cannot

The Respondent Plaintiff respectfully submits, however, this question has already heretofore been passed upon by this court, so that the real question raised by the petition, would be better stated as follows:

*Did this court err* when it upheld the contention of the petitioner in *U. S. v. Griffin* (303 U. S. 224) that the respondent's claim presented a judicial question of just compensation under the Fifth Amendment which the Court of Claims had jurisdiction to entertain and decide?

### **SUMMARY OF REASONS WHY THE WRIT SHOULD NOT BE GRANTED.**

(1) The petitioner-defendant's argument in support of its Reason I, contrary to its previous contention in *U. S. v. Griffin; supra*, is that, in determining the compensation for carrying the mails the Commission is doing nothing more than fixing common carrier charges for the ordinary transportation of freight and passengers, rests upon a fundamentally erroneous conception.

One has but to read the Mail Pay Act, particularly section 541 of Title 39 U. S. Code, to see that as pointed out by the Supreme Court in its decision involving the same Commission order (*U. S. v. Griffin*, 303 U. S. 226), the carriage of the mails is compulsory taking of private property and devoting it to public use. It was for that reason that this Court when it had before it the same Commission order that is involved in this proceeding, specifically stated that "If the Commission makes the appropriate finding of reasonable compensation but fails, because of an alleged error of law, to order payment of the full amount which the railroad believes is payable under the finding, the Court of Claims has jurisdiction of an action for the balance, as the claim asserted is one founded upon a law of Congress," and went on to point out that railway mail service is compulsory, and if the Commission made an order for compensation which was confiscatory the Court of Claims would have jurisdiction.

The petitioner-defendant's argument is that this Court misconstrued the import of the cases which were cited in its opinion in the *Griffin* case, and that this Court intended only to say that the Court of Claims would have jurisdiction only if the Post Office Department failed to pay the full amount of compensation found to be due by the Interstate Commerce Commission in its order. The respondent-plaintiff respectfully submits that it is obvious that this Court never intended that the Court of Claims' jurisdiction should be so narrow. What it really held was that the Court of Claims had the power to determine whether the final order of the Commission fixing compensation for the taking carried out an appropriate finding of the Commission which would fix adequate compensation for the taking; and, in a second type of situation, whether the final order was adequate to avoid confiscation. Incidentally, it may be parenthetically remarked the petitioner-defendant takes an inconsistent position when it argues on the one hand, in support of its Reason 1 (p. 22) that the jurisdiction of the Court of Claims should be denied, because district courts under their general jurisdictional powers could still review railway mail pay orders and, on the other hand, in its support of its Reason 3 (p. 25) it seems to contend that no court has or should have the power of review of a mail pay order of the Commission.

(2) The petitioner-defendant argues that the carrier in this case did not exhaust the administrative remedies before resorting to the courts, arguing that the Post Master General is authorized to make special contracts where, in his judgment, the conditions warrant the application of higher rates, but, while it is true that administrative remedies must be exhausted, this is not the type of a case which falls within the definition of administrative remedy. A special contract might be entered into in order to avoid having to go to the I. C. C. in the first place, but it is not a remedy to be resorted to between the time when a Commission order is handed down and the time of taking an ap-

peal to a court for a review of that decision. It is also true that one is not required to do a useless act and when it is obvious from the written and spoken statements by the representatives of the Post Office Department that that department would entertain no thought of an increase in compensation for carrying the mail, it would be but an idle gesture to formally ask the Post Master General for a special contract.

(3) The petitioner-defendant argues that even if the Court of Claims has any jurisdiction at all, the range of that jurisdiction to review is very narrow because the Commission's judgment should not be disturbed because it is in a field peculiarly within the Commission's discretion, because of its presumed expertness.

That argument rests upon the same erroneous concept as the petitioner-defendant's argument in its Reason 1, viz., that what is involved is only a legislative rate making power, whereas the real issue is one of just compensation for a compulsory taking of private property and services for public use.

In any event, the courts always have jurisdiction to determine whether there has been confiscation, and where it comes to taking of property for public use the question of confiscation is always present and the courts have jurisdiction to determine whether the compensation fixed meets the requirements of the Constitution. The Court of Claims in particular is constantly called upon to determine the adequacy of compensation in order to avoid confiscation, whereas the issue of confiscation is not the issue which is initially involved in the legislative fixing of rates.

(4) The petitioner-defendant's argument in support of its Reason 4 seems to charge, in an oblique manner, that the findings and judgment of the lower court was contrary to the evidence.

The respondent plaintiff respectfully submits that in the absence of specifications of error to any of the lower



court's findings of fact, the petitioner-defendant's assertions attacking the correctness of the court's conclusions are not entitled to serious consideration. Nevertheless, the petitioner-defendant's propositions, with an opening assertion that the lower court held that mail pay compensation must be determined by a particular formula which compelled abnormal amounts of unused space not devoted to transportation of the mail, if not refuted might possibly influence the court to grant a writ to look into those contentions. Hence, as a timely precaution, to save this court from the possibility of a greater burden later, each of the petitioner-defendant's propositions are examined hereinafter, beginning at page 17 and running to page 36. *However, the respondent-plaintiff does not ask the court to read that expose unless it should be curious as to the merits.*

### **REASONS WHY THE WRIT SHOULD NOT BE GRANTED.**

The fact that the petitioner-defendant's statement of the "Questions Presented" (p. 2) and its "Specification of Errors to be Urged" (p. 5) are not clearly matched with each other; and matters of argument are repetitively scattered throughout its "Statement" (p. 3), and in its "Reasons for Granting the Writ" (p. 17); and that there is no separate summary to "exhibit clearly the points of fact and of law being presented" makes for confusion, but respondent will endeavor to resolve that confusion by ignoring the many errors of omission and commission elsewhere in the petition, and address its arguments herein to a refutation of the propositions asserted in the petitioner's "Reasons for Granting the Writ", and on the assumption that in that part of its petition is included all the points and arguments upon which petitioner really thinks it can rely.

### **As to the Petitioner-Defendant's Preface (p. 17).**

The petitioner prefaces its four numbered reasons with the statement that this case presents the questions as to whether orders of the Interstate Commerce Commission fixing rates of compensation at which common carriers by rail shall carry the mail are reviewable in the Court of Claims, if at all; and, surprisingly enough, asserts that this question has not heretofore been presented to this court (p. 17). To the contrary however the respondent respectfully submits that this question has heretofore been presented to, and passed upon, by this court in this same cause of action between the same parties in *U. S. v. Griffin*, 303 U. S. 226.

### **As to Petitioner-Defendant's Reason No. 1 (p. 17).**

In its Reason 1, the petitioner-defendant argues that the Court of Claims erred in accepting jurisdiction because, it contends, the proceeding was one for the review of legislative rate making.

That contention necessarily involves the proposition that this Court erred in previously holding in *U. S. v. Griffin*, 303 U. S. 226, that the issue was one of just compensation for a compulsory taking; and that there is nothing now left of both the doctrines of res judicata and stare decisis.

When the same cause of action was before this Court in *U. S. v. Griffin*, 303 U. S. 226, the petitioner-defendant contended, and was upheld in its position by this Court, that the issue involved the judicial question of just compensation, hence was not a review of legislative rate making within the jurisdiction of a three judge district court under the Urgent Deficiencies Act.

The petitioner-defendant advances no logical reasoning to support the proposition that rates for mail pay compensation come within the category of legislative rate regulation; and none of the cases cited by the petitioner are in point because they relate to legislative rate making only. The petitioner-defendant cites no authority whatever for

its theory that the proceeding before the Court of Claims was one for the review of legislative rate making and not one for the judicial determination of the just compensation required by the constitution. In any event, the respondent plaintiff respectfully submits that merely because the Congress selected the Interstate Commerce Commission as the medium for determining the basis and measure of the prices for the units at which should be reckoned the amounts necessary to pay just compensation for the taking of property by the Government, and the term employed to designate such prices is the word "rates"; and that those from whom the use of property are taken are common carriers, in no way changes the fact that the use of the property and service was compelled under statutory authority subject to a constitutional duty to pay just compensation.

The petitioner's theory is squarely in conflict with what this court expressly declared in *U. S. v. New York Central*, 279 U. S. 76, 78, where it was said:

"The question is one of construction which requires consideration not of a few words only, but of the whole act of Congress concerned. This is the Act of July 28, 1916, chap. 261, §5, 39 Stat. at L. 412, 425-431 (U. S. C. Title 35, Chap. 15, where the long §5 is broken up into smaller sections) which made a great change in the relations between the railroads and the government. Before that time the carriage of the mails by the railroads had been regarded as voluntary (*New York, N. H. & H. R. Co. v. United States*, 251 U. S. 123, 127, 64 L. ed. 182, 193, 40 Sup. Ct. Rep. 67); now the service is required (U. S. C. title 30, §541); refusal is punished by a fine of \$1,000 a day (U. S. C. title 39, §563), and the nature of the services to be rendered is described by the statute in great detail. Naturally, to save its constitutionality there is coupled with the requirement to transport, a provision that the railroads shall receive reasonable compensation."

It seems to the respondent that the lower court was entirely sound when it said:

The duty of the Commission extended beyond that of establishing rates. The statute went further and required the Commission to fix fair and reasonable compensation to the individual carrier. It had to be the individual carrier, for otherwise the term "compensation" is meaningless. Only in the event that they were "just and equitable" could the Commission "fix general rates applicable to all carriers in the same classification". 39 Stat. 412, 430. Rates are not just and equitable that give one carrier a net revenue and impose upon another carrier, in the same class, a deficit." (R. 48).

The lower court also well said in the course of its opinion that:

"In *New York Central Railroad Co. v. United States*, 65 C. Cls. 115, affirmed on Appeal, 279 U. S. 73, which was a suit for mail pay as fixed by the Interstate Commerce Commission from the date of filing of application with that Commission for readjustment of compensation, this court took jurisdiction because the carrier was 'asserting a claim founded upon a law of Congress'. The Act of July 28, 1916, 39 Stat. 412, was involved as here. But with reference to the power and jurisdiction of the Commission this court said: 'Congress erected a tribunal or accepted one already in existence to discharge a duty which was judicial in its nature, the ascertainment of reasonable compensation to carriers for services exacted by statute,' citing *Monongahela Navigation Co., v. United States*, 148 U. S. 312, 327, to the effect that when a taking has been ordered, then the question of compensation is judicial." (R. 41.)

#### **As to Petitioner-Defendant's Reason 2 (p. 23).**

The petitioner-defendant argues that the court below "in accepting jurisdiction, also failed to follow the well established doctrine that administrative remedies must be exhausted before resort can be had to the courts" (p. 23).

The petitioner-defendant's contention would certainly have been more interesting had some authorities been cited



to support the argument that a mere authorization to an executive official to enter into a special contract was an administrative remedy within the rule. When an express remedy was coincidentally prescribed in the same law.

<sup>9</sup> The rule itself is, of course, well known, and is analagous to the rule in equity that jurisdiction will not be taken unless there is no adequate remedy at law. To this effect, in a note in 51 *Harvard Law Review*, 1251, 1264 on "primary jurisdiction effect of administrative remedies on the jurisdiction of the courts," it is said, among other things, that:

"Similarly application to the Commission will not be required unless the administrative remedy is adequate; the Commission must have the power to conduct a hearing under reasonable procedural standards."

*Kansas City So. Ry. v. Ogden Local District*, 15 Fed. 2, 637;  
*Mann v. Des Moines Nat. Bank*, 18 Fed. 2, 269.

*Yakima Valley Bank & Trusts v. Yakima County*, 149 Wash.  
552, 271 Pac. 280.

*Railroad Commission v. Duluth Street Railway*, 273 U. S.  
625, 628, 71 L. ed. 807, 810, in which the analagous rule  
that state remedies must first be exhausted was invoked,  
this Court said:

"But as against these considerations it must be remembered that the requirement that state remedies be exhausted is not a fundamental principle of substantive law but merely a requirement of convenience or comity. Where, as here, a constitutional right is insisted on, we think it would be unjust to put the plaintiff to the chances of possibly reaching the desired result by an appeal to the state court, when at least it is possible that, as we have said, it would find itself too late if it afterwards went to the district court of the United States: *Pacific Teleph. & Teleg. Co. v. Kaykendall*, 265 U. S. 196, 68 L. ed. 975, 44 Sup. Ct. Rep. 553; *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, 67 L. ed. 659, 43 Sup. Ct. Rep. 353."

Furthermore, the rule is also essentially one of comity, and sound judicial discretion, otherwise known as the rule of "primary jurisdiction," whereby in those situations where a legislative agency has been charged with the duty of applying a remedy the courts will usually require that recourse to that remedy be exhausted as a prerequisite to the exercise of judicial jurisdiction. On this point, in an article in 27 *Columbia Law Review* 450, on "The

Whether or not the plaintiffs did or did not ask the Post Master General for a special contract is not a matter of definite record (R. 134). The only witness who referred to the possibility of a special contract was General Superintendent Hardy, who did not take that office until 1937 (R. 129); and the most he could say was that, so far as he knew, the plaintiffs had never applied to the Post Master General for a special contract (R. 401); but that he did not know that the plaintiffs had never done so (R. 101, 134).

Furthermore, the witness admitted that special contracts had been made in only a very limited number of instances under special circumstances (R. 102, 125); and it was and is a matter of common knowledge that the Post Office Department employed special contracts only under "very extraordinary conditions" (Pl. Ex. 26, R. 155, 157); and it was its policy to "keep away from the special contracts all we can". (R. 161).

necessity of exhausting administrative remedies before resorting to judicial review, the author states:

*"Excuse of condition*—In the absence of a statutory mandate it is within the sound discretion of the court to decide whether the particular case is an appropriate one for requiring prior resort. *U. S. v. Abilene S. R. Co.*, 265 U. S. 274."

\* \* \* \* \*

In a note in 27 *Columbia Law Review* 454, on this topic the author says:

"Where the futility of further reliance on administrative machinery is due to the fact that the time for resorting to it has expired, a situation is presented which illustrates the extent to which the application of the maxim in any case is discretionary with the courts" (citing *Prentice v. A. C. L.*, 311 U. S. 210). "Where the case for inadequacy approaches certainty, however, judicial relief has been granted" (citing *Union Pacific v. Wald County*, 247 U. S. 282; *Proctor & Gamble v. Sherman*, 27 Fed. 2nd 145). (Cf. *H. Krumgold & Sons v. Jersey City*, 130 Atlantic 653; *Lasick v. Binda*, 127 Atlantic 619; *Prendergast v. N. Y. Teleph. Co.*, 262 U. S. 43; *B. & O. v. P. R. Co.*, 196 Fed. 690; and *Smith v. Ill. Bell Tel. Co.*, 270 U. S. 587.)

The situation in this case was as follows:

(a) The authority granted the Post Master General rests wholly within his sole discretion; and it did not purport any correlative right in, and laid no duty upon, the carrier.

(b) The same Act provides in detail an express remedy by procedure before the Interstate Commerce Commission; which did not require, or even contemplate, either as a part thereof, or as a pre-requisite thereto, that there must first have been a request by the carrier on the Post Master General for a special contract.

(c) Even if the authority given by the law to the Post Master General to make special contracts could possibly be construed as giving a carrier an enforceable remedy, there is no rule which requires a carrier to seek that remedy before it pursues the remedy expressly provided by the law.

(d) The authority for the Post Master General to enter into a special contract necessarily speaks for the future, and not for the past, hence a special contract could not be a remedy for any of the period prior to the decision of the Supreme Court on February 28, 1938.

(e) There is no claim that the Post Office Department, well knowing that the carrier was in need and justly seeking relief, ever made any offer of a special contract. Indeed, to the contrary, the record shows that it was firmly determined not to make any concession whatever (Trans. in 63 (1937) side folio pages 142, 143, and Pl. Ex. 3, R. 140).

In any event the facts and circumstances show clearly that an application to the Post Master General was, or would have been, vain and futile; and the law does not require a vain thing.

### **As to Petitioner-Defendant's Reason 3 (p. 24).**

The petitioner's argument seems to be that if this court does not now decide that it was mistaken in holding in *U. S. v. Griffin*, 303 U. S. 226, and now holds again that the Court

of Claims had jurisdiction, nevertheless the Court of Claims erred anyhow in disturbing rates fixed by the Commission, because the petitioner still insists that this case is one for the review of legislative rate fixing for common carriers.

The respondent respectfully submits that the petitioner's argument, and cases cited, are not in point for the single elementary reason that this case is one for the judicial determination of just compensation required by the constitution, and is not one for the review of legislative rate making.

Furthermore, even if the cases cited by the petitioner for the proposition that the Court should not disturb the conclusions of a legislative agent were applicable here, that doctrine, as the cases cited themselves show, is limited to those conclusions of a legislative agent which "as applied to the facts before it and viewed in its entirety, produces no arbitrary result" (*Fed. Power Comm. v. Natural Gas Pipe Line Co.*, 315 U. S. 575, 576).

That the Commission's order in this case "as applied to the facts before it and viewed in its entirety produces an arbitrary result is clearly evident in the unanimous view of four able judges in the court below (R. 12, 36, 48), as well as by the unanimous opinions of two able federal district court judges, and one judge of the United States Court of Appeals, sitting as a three judge district court on two occasions (Trans. in 63-1937) folio 29, 55).

#### **As to Petitioner-Defendant's Reason 4 (p. 27).**

In its argument in support of reason 4, the petitioner does not clearly relate its "Reasons" to "Question 4" or to any "Specification of Error," but engages in a critical discussion of many evidentiary details. The purpose of the petitioner's argument for its reason 4 seems to be *(without assigning a single specification of error to any of the findings of fact by the lower court)* to try to argue this court into the impression that the findings of fact by the lower



to a mandatory inclusion of such cost" being required by the reviewing court. The respondent finds no language in the decision of the Lower Court which seems to justify the petitioner's contention. To the contrary, it said:

"The so called 'computed' cost being the only cost that can be used, it must be fairly and reasonably computed. To what extent it approaches a fair and reasonable cost not in excess of actual cost is a matter not yet within the ability of the Commission to determine. It is a question that must be answered by good judgment, by those peculiarly fitted and equipped to ascertain the requisite facts as to such cost and exercise that judgment. Congress has chosen the Interstate Commerce Commission to perform that function, and it has done so.

As the Supreme Court has said, this Court has jurisdiction to render judgment of recovery for an amount sufficient to constitute fair and reasonable compensation under the facts as found by the Commission, unpaid through failure of the Commission, because of an error of law, to order payment thereof.

Under Finding 46 herein, it is shown that the Interstate Commerce Commission found and determined that plaintiff would require an increase in its mail revenue of 87.4% in order to secure for itself, under Plan 2, adopted by the Commission, a return of 5.75% therefore fixed by the Commission, on its investments in road and equipment engaged in mail traffic. (R. 43, 44.)

The required increase of \$31,227 in mail revenue is, as found by the Commission, 87.4% of the actual gross mail revenue received during 1931 (\$31,227 ÷ 35,728 = 87.4%). (R. 45.)

In view of the record presented the basis employed by the Interstate Commerce Commission, that is to say Plan No. 2, appears to be fair and reasonable. The studies made are in no wise shown to be out of line with the then state of the art science, or profession of statistical analyses and cost accounting.

The deficit found in plaintiff's mail operations was ascertained according to the formula suggested by the

Government and used by the Commission to propose the rates for general application. As we have pointed out, the ascertainment of fair and reasonable compensation must proceed from a fair and reasonable basis. The Commission, first by its use of Plan No. 2, adjudged it to be a fair and reasonable basis. And out of that basis there has been ascertained, by formulae prescribed by the Commission, what is the fair and reasonable compensation for plaintiffs' carriage of the mail beginning the first of April, 1931, and ending at the close of February, 1938. Fair and reasonable compensation cannot be both a deficit and the amount of \$186,707.06 so found. It is, we conclude, the latter. (R. 45, 46.)

The duty of the Commission extended beyond that of establishing rates. The statute went further and required the Commission to fix fair and reasonable compensation to the individual carrier. It had to be the individual carrier, for otherwise the term "compensation" is meaningless. Only in the event that they were "just and equitable" could the Commission "fix general rates applicable to all carriers in the same classification". 39 Stat. 412, 430. Rates are not just and equitable that give one carrier a net revenue and impose upon another carrier, in the same class, a deficit.

The rates authorized by the Commission were based on a grouping together and then given particular application without change. It did not follow that rates, fair and reasonable for an average road (which in fact did not exist), would be fair and reasonable for all existing roads. The statute required more than mere rates; it required fair and reasonable compensation, and the duty of fixing upon and authorizing payment of fair and reasonable compensation in any particular case could not be avoided because of the magnitude of the task, or because some other methods of calculation, which, although neither approved nor adopted, might possibly give other results.

There is no presumption that the average is true of the particular. The presumption is otherwise, and the plaintiffs, having shown their railroad to be in a comparatively low scale, and thus distant from the aver-

also, had no great burden of proof before them in presenting their case to the Commission. It was for the Commission to demonstrate that the general rates prescribed gave the plaintiffs a fair and reasonable return. This the Commission failed to do. More than that, the Commission has by its findings, using its adopted plan and its own methods as applied to plaintiffs' circumstances, proved that plaintiffs have been underpaid \$186,707.06 in fair and reasonable compensation for the period in question. (See Finding 23.)

If that which the Commission determined is fair and reasonable compensation for the representative road, it must, we think, be fair and reasonable for any road that is so represented. The reasons given by the Commission for not ordering payment, on the basis of its findings, of the annual sums making up the above total of \$186,707.06, are not convincing or even persuasive. In our opinion they all overlook the statutory mandate that the compensation to be allowed for carrying the mails must be reasonable, and the constitutional one that it must be just." (R. 48.)

### CONCLUSION.

(1) The petitioner's argumentative representations in its "Statement" and in its "Reasons Why The Writ Should Be Granted" of numerous alleged points of evidentiary detail are incorrect and misleading, and is refuted by the record.

(2) The decision of the lower court is entirely consonant with the findings of fact, and the findings of fact are entirely consonant with the evidence, as is evident from the fact that the petitioner has failed to assign a single direct specification of error to any one of the numerous express findings of fact upon which rests the decision of the lower court.

(3) The petitioner's contention, as a proposition of law, that the cause of action was one for the review of legislative rate making, that the lower court lacked jurisdiction is in direct conflict with the decisions of this Court in *U. S. v. New York Central*, 279 U. S. 75, and in *U. S. v. Griffin*, 303 U. S. 226; and is in contradiction of its own previous posi-







tion, and is contrary to the principle of res judicata, since the point was expressly settled in the latter case between the same parties on the same cause of action.

(4) The law of the case has already been clearly settled in *United States v. Griffin*, 303 U. S. 226, and this case presents no new principle of general importance since the law is already well settled by the decisions of this Court, both in said *U. S. v. Griffin*, 303 U. S. 226, and in *New York Central v. U. S.*, 279 U. S. 76.

Wherefore the respondent respectfully submits that the petitioner has failed to make a showing which would warrant and justify this Court in granting it; hence the defendant's petition herein should be denied.

Respectfully submitted,

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Dated Washington, D. C.,  
November 16, 1948.

prices from an unfair and an unreasonable cost toward a fair and reasonable compensation.

Here, however, it is found that "there is no evidence which indicates that plaintiffs' operating costs were excessive in relation to the character of the road and the traffic area, or that such costs were increased by inefficiency, negligence, or uneconomical management or operation by the plaintiffs."

Nowhere in the Commission's findings or conclusions in plaintiffs' case do we find even an intimation that the so-called 'actual' cost, whatever it might be, was anything but fair and reasonable. What we do find is that, on the facts as found and stated by the Commission, there is an erroneous conclusion of law by the Commission that plaintiffs have been fairly and reasonably compensated for their mail service. Cf. *Case, et al. v. Los Angeles Lumber Products Co., Ltd.*, 308 U. S. 106, 114, 120. (R. 43.)

"The so-called 'computed' cost being the only cost that can be used, it must be fairly and reasonably computed. To what extent it approaches a fair and reasonable cost not in excess of actual cost is a matter not yet within the ability of the Commission to determine. It is a question that must be answered by good judgment, by those peculiarly fitted and equipped to ascertain the requisite facts as to such cost and exercise that judgment. Congress has chosen the Interstate Commerce Commission to perform that function, and it has done so.

As the Supreme Court has said, this Court has jurisdiction to render judgment of recovery for an amount sufficient to constitute fair and reasonable compensation under the facts as found by the Commission, in part through failure of the Commission, because of an error of law, to order payment thereof.

Under finding 16 herein, it is shown that the Interstate Commerce Commission found and determined that plaintiff would require an increase in its mail revenue of 87.4% in order to secure for itself, under Plan 2 adopted by the Commission, a return of 5.75% therefore fixed by the Commission, on its investments in road and equipment engaged in mail traffic." (R. 44)

**PROPOSITION 4:** That the Commission gave consideration to various other factors, hence the lower court's computation of rates on the Plan 2 formula was therefore not an application of the law to the findings of the Commission (pp. 27, 28).

The respondent respectfully submits that because the Commission gave controlling consideration to other factors instead of to the evidence before it, it in no way impairs the fact that it found that the results of the cost study, showed the need for an increase of 87.40%.

**PROPOSITION 5:** That the lower court's adoption of the Commission's finding, was an independent judgment that a particular formula properly measured fair and reasonable rates (p. 28).

The respondent respectfully submits that the lower court did indeed arrive at an independent judgment on the evidence before it which evidence included the Commission's findings on the result of the cost study, and also all the various factors or circumstances relied upon by the Commission and the petitioner.

**PROPOSITION 6:** That the cost figures were unfairly weighted against the mail traffic, and excess amounts of space "mitigated" against complete dependence on the cost formula (p. 29).

The respondent respectfully denies the correctness of any part of this proposition, and for substantiation refers to the breakdown herein following on each point relied upon by the petitioner to support said proposition 6, viz.:



As to (a): That cost figures were unfairly weighted against mail traffic, for space in the baggage car was allocated to mail traffic on the basis of the total service authorized, although the mail traffic actually used less than the authorized space (pp. 29, 31).

Also in the first paragraph, page 7, and again on pages 11 and 12, the petitioner asserts that the Commission found that "another element" of doubt as to the reliability of the space study as a basis for determining the cost of service, "arises from treating the 3 foot units of authorized mail space as the full space used by mail, regardless of the load carried;" as no physically divided space was set apart for 3 foot service, and the number of pouches carried were normally less than the maximum number of 50 to 56 pouches.

There is no merit to this contention because minimum space units are not ordered upon any theory of maximum use thereof. A three foot closed pouch unit is simply the smallest unit of space which can be authorized when any transportation service at all is requisitioned. That minimum was set by the Commission with full appreciation of the fact that in few, if any, instances would the actual service ever be exactly equal to the maximum capacity limit beyond which the Post Office Department would have to make an authorization for a larger unit of space. Nor is that condition peculiar to minimum 3 foot units. Pay for a seven foot unit is required whenever the 3 foot maximum of 56 sacks or the equivalent is exceeded, although the excess might not be more than 5 sacks, and so on up the scale. (Finding 21, R. 27.)

Furthermore, although the minimum unit is for a theoretical three linear feet of car space, much more than three linear feet of the floor space area is actually required by the nature of the service. In theory an average of as many as 56 sacks and packages, if racked up and piled six feet high, could be crammed into three linear feet; but that theory does not square with the actualities. On a three

foot closed pouch authorization where the volume is too small to warrant a railway post office apartment with a postal clerk to handle the mail, the respondent's employees take on and put off mail sacks and packages, not only at the beginning and at the end of each trip, but also at every intermediate post office station, and care for the same in transit. Because of the necessity for this constant handling, in and out, of sacks and packages enroute the mail cannot be stacked vertically to the theoretical height of six feet, but for prompt handling must be spread out over a much greater area of floor space. That fact largely explains why the Post Office Department has always preferred to use the space authorized as being equivalent to the space used.

In any event, the proportion of 3 ft. closed pouch service to R. P. O. service is small, representing in revenue from mail service only 11.98% of the service. That fact, together with the desire for simplification for the test study purposes explains why this respondent, and carriers generally, have been willing to consider the space authorized as being equivalent to the space used.

Obviously, therefore, to the extent that the use of space authorized as the space used may represent any "element of doubt" the doubt is one which inures to the advantage of the Government, and cannot fairly be inverted as a factor to discredit the result of the cost study.

**As to (b):** That, although a 15 ft. apartment was authorized, respondent furnished a 30 ft. apartment, and thereby increased space charged to mail; and if that had not been done the mail traffic would have yielded a computed profit (p. 29).

This contention is fallacious and has no justification in the facts. It has heretofore been so thoroughly exploded that its present repetition is amazing in the face of plaintiff's Exhibit 21 (R. 151).

The joint study on which both the respondent and the Post Office Department have consistently relied included a

study in the field for some thirty days of the actual amount of space transported in passenger trains, and the use of that space by each respective service. That study was supervised by experts of the Post Office Department, and the record does not show that a car with a thirty foot post office apartment ever entered into that field study.

This "30-foot fallacy" was first advanced by the Commission in its second report after a second hearing when its first order had been enjoined. By that injunction the Commission had in effect been placed in an adversary position, and in its second report it strove to give all the reasons it could to seemingly justify its arbitrary action. Under these circumstances it mistakenly seized upon an almost casual statement made by Witness Fulghum for the Post Office Department in the second hearing, viz., in describing an inspection trip he had made over the line of the Georgia & Florida, some two years after the time of the cost study. Among the details recited was that, on that occasion, a 30-foot R. P. O. apartment had been furnished. Queried as to the significance of the fact he merely said that while the Post Office Department preferred to have the size it ordered, it made no objection when oversize space was furnished. That, however, was the origin of and base of the fallacy. No such contention was made by the Post Office Department whose experts know better.

Furthermore, the cost study showed that, in addition to the space actually used in the combination cars by the different services, there was more than 15 feet of waste space unused by any service. Consequently, when a car with a 30-foot R. P. O. apartment was furnished, it neither increased or decreased the amount of space counted as actually used by the Post Office Department, or of the amount of the waste space to be apportioned. Plaintiffs' Exhibit No. 21 (R. 151) demonstrates this fact both graphically and mathematically.

When this fallacy was considered by the three judge District Court, and with all the evidence before it, and after hearing argument, it said:

"Further argument of the Commission, as we understood it, is that because 30 feet instead of 15 feet is partitioned off for mail, this adds 15 feet to the unused space for which the Post Office Department pays a part. We do not so understand the testimony. Our understanding is that the unused space is the same wherever the partition be placed." (Pl. Ex. 1, p. 54).

Furthermore the District Court in its second decision quoted with approval its findings in its first decision that "There is no attack upon the efficiency of the operation of this railroad"; "There is no charge of extravagance"; and "There is no criticism of the character of the service performed in connection with transporting the mail", (Trans., p. 63 (1937) folio 103, 105).

When this contention was pressed upon the lower Court, it, in effect, rejected same in Finding 21 when it said only that:

"The plaintiffs had acquired and operates some cars with a 30-ft. R. P. O. apartment, which at various times were furnished to the Post Office Department when a 15-foot space was ordered. In such event the postal clerks used only 15 feet of the 30-foot apartment, leaving the remainder unused, and the plaintiffs were paid on the basis of the rate for a 15-foot R. P. O. apartment" (R. 26).

**As to (c): That forty-four percent of the total car space was unused (p. 29).**

In making this contention the petitioner stumbled into error on its own account. It evidently labored under a misapprehension as to what the Commission meant, whereas the Commission referred only to space in combination cars, viz., the baggage car in which 3 ft. closed pouch service is rendered, and not to the total of all car space moved. The Commission did not say that 44% unused space was excessive, nor was that fact coupled with any claim that it had any real significance. The fact that the Georgia & Florida is a line of very light traffic density is simply one of the



predominant characteristics which it has in common with short lines or less than one hundred miles. Indeed, the lighter loading of passenger cars is one of the marked differences between the great "mass production" low unit cost systems like the Pennsylvania on the one hand, and the high unit cost short lines and the Georgia & Florida on the other. The Commission, for that basic reason, properly recognized this difference in prescribing higher compensation for short lines under 100 miles, but although the conditions were similar, did not do so for the Georgia & Florida Railroad, when the Post Office Department opposed it for policy reasons (Trans., p. 63, (1937). Folio 43, 44, 45, 142, 143, 144).

Furthermore, as the lower Court points out in its opinion:

"Here, however, it is found that there is no evidence which indicates that plaintiffs' operating costs were excessive in relation to the character of the road, and the traffic area, or that such costs were increased by inefficiency, negligence, or uneconomical management or operation by the plaintiffs." (R. 43.)

**As to (d): That the Commission further pointed out that "The mail service pays considerably more for equivalent units of service than passenger proper or express (p. 30).**

The respondent respectfully submits that it is not reasonable compensation when it merely yields a smaller deficit than do other branches of the service. Nor can it be said that any branch of the service is bearing its fair share of the expense of operation unless it fully pays for the cost of performing that operation. The three-judge Federal Court in its opinion of January 23, 1935, devastated petitioner's argument on this point when it said:

"The fact that this railroad lost more money on other services rendered by it \* \* \* does not refute or impair the fact that the compensation allowed this railroad does not equal the cost of so doing." (Trans. in 63 (1937) side Folio 58.)

Furthermore, the very object of the space study, which the Commission has always approved, was to segregate the respective passenger services into separate and distinct "compartments", so that there would be no confusion of thought to becloud the question as to what rates would be sufficient to afford just and reasonable compensation to carriers for the transportation of the mails in the authorized space units.

The Commission itself rejected the converse of this contention in the New England Mail Pay Case (85 I. C. C. 157) when the Post Office Department argued that the mail service should not pay its full proportion of the cost because those carriers were then deriving an adequate return from other passenger services.

In any event, there is no certainly reasonable compensation in a deficit, no matter how much smaller or larger than other deficits.

**As to (e): That comparison of the cost of operating the space actually authorized for mail, omitting allocated unused space, with the rate paid for this space, permitted a generous return on investment (p. 30).**

This is an irrelevant proposition. Furthermore, it can be asserted just as uselessly that by using one linear foot of car space per passenger, that if a train ran filled to capacity with passengers the railroad would receive 2.8903 cents per car-foot mile for the transportation of each passenger, as compared with only 1.0297 cents per mile for requisitioned mail service (Trans. in 63 (1937) folio 118, 354).

The Commission itself seemed to have previously disposed of that sort of notion when it said:

"It is obvious that in each branch of the railroad services, whether freight, passenger, express, or mail, a certain amount of empty or unused space will be found. Many passenger seats necessarily go empty, and the baggage, mail, and express cars are not always filled to their capacity. It must be plain that the rate

which the shipper pays for a carload must include an allowance for the cost of some empty mileage, and the price of railroad tickets must cover the cost of transporting the seats which normally go empty. Similarly, it ought not to be disputed that when the department orders or authorizes a definite amount of car space the rate to be paid therefor must cover the cost of hauling the empty space necessarily hauled to provide the service requested." (Railway Mail Pay 56 I. C. C. 41.)

**As to (f): That it is significant that receipts from mail traffic, approximately \$250,000 for the period 1931-1938 constituted net additions to its revenue (p. 30).**

The petitioner-defendant merely tosses this assertion into this court's lap without explaining what it represented and why it should consider same significant. However, the assertion does have significance as exemplifying the generally flimsy character of the petitioner-defendant's contentions.

The petitioner's assertion is derived from its desperate contention in the court below, as set out in Finding 31 "that in an action to recover additional compensation \* \* \* the amount of compensation should be based on 'out of pocket' costs" (R. 33). In Findings 32 and 33 the court below sets out in detail the self obvious absurdities of the petitioner-defendant's contentions of "out-of-pocket" costs, which, among other things, "takes no account of investment and contemplates no allowance of a return there on" (R. 35). The lower court said:

"The 'out-of-pocket' or 'added' cost theory has been injected into the case (findings 31-33), but we are not convinced that additional service is in any different situation than the service to which it is an addition, as far as computing fair and reasonable compensation is here concerned. We think there is just as good reason for considering express as the added service rather than the mail. The fact that a carrier is only too glad, perhaps anxious, to carry mail to help cover otherwise wasted floor space, is understandable. But that is no

reason why the mail should be carried at "bargain" rates. A passenger who goes aboard a train after the coach has already accumulated a paying load, must nevertheless and rightly so, pay full fare, along with all the rest. *Ct. Fred R. Cuban Co. & United States*, 103 C. Cls. 174, 183. We do not say that the added cost or "out-of-pocket" theory, with its implications, is inapplicable in all cases. But the theory, if we are to believe the witnesses, has not matured into practice in the determination of mail pay." (R. 45.)

On this contention the lower court concluded:

"We cannot agree that the basis of compensation is to be governed by the added or out-of-pocket cost theory. It was not applied in Plan No. 2, as that plan is explained to us, and we cannot find that plan grossly erroneous. The plan applied to a group gave certain rates, but the rates good for the group did not fit plaintiffs' road. The plan applied to the plaintiffs' road gave higher rates than to the average road and are the only rates presented in the Commission's decisions that give the plaintiffs fair and reasonable compensation. The plaintiffs here are entitled to them. The average road has no physical existence and the general rates put into particular effect would mean greater or less compensation for the individual carrier. But the government statute was careful to make provision whereby the rates might not be confiscatory for any one road." (R. 47.)

**As to (g): That under the lower Court's decision the Government will be charged with paying double compensation for space which it does not use (p. 31).**

This proposition thus stated is so ambiguous, if not disingenuous, that respondent is uncertain as to just what it is meant to relate. However, if the petitioner refers to the contention that it does not use all of the space it requisitions reference is respectfully made to what has already been said as to (a) on page 25 supra.



If petitioner refers to the Post Office Department's Plan No. 2 for the apportionment of unused or waste space which has been employed in all mail pay cases, reference is made to plaintiffs' Exhibit 20 (R. 145), for a description of that plan. Of it the Commission said:

"Plan 2 recognizes that fact that an apartment is only a fraction of a car, that the operation of that fraction requires the operation of a whole car and that the operation of a whole car necessarily causes the operation of a certain amount of unused space in the remainder of the car. *The justification for apportioning some of this unused space to the service using the apartment is that the car is the unit of operation and that the unused space outside the apartment, necessarily operated in a combination car to supply the space required for service in such cars, is due to the apartment service as much as the services in the baggage end.*" (R. 148).

**As to (h):** That it is clear that it is not legally permissible to increase the cost to the government through the use of oversized equipment (p. 31).

To that general proposition, standing by itself, the respondent takes no exception. However, there is no condition in this case to which it has any application. If the contention is that the space apportioned to the mail service in the cost study was inflated by the occasional furnishing of a 30-foot R. P. O. apartment when only a 15 foot apartment was authorized, reference is made to the complete refutation of that fallacy under the heading of (b) p. 26, supra.

**As to (i):** That whether or not it is permissible to include the cost of operating unused space in mail rates. It seems clear error for a reviewing court to make the inclusion of such cost mandatory (p. 32).

The respondent finds it difficult to understand, in the absence of any express specification of error to support same, just what the petitioner means, or to just what it refers, as



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SUPREME COURT, U.S.

NOS. 135 and 198

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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1948.

No. 135.

135

THE UNITED STATES, *Petitioner*,

v.

ALFRED W. JONES, Receiver for Georgia and Florida  
Railroad.

No. 198.

198

ALFRED W. JONES, Receiver for Georgia and Florida  
Railroad, *Petitioner*,

v.

THE UNITED STATES.

---

On Writs of Certiorari to the Court of Claims.

---

**BRIEF IN REPLY FOR THE PLAINTIFF, ALFRED W.  
JONES, RECEIVER FOR GEORGIA AND  
FLORIDA RAILROAD.**

---

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Filed February 2, 1949.

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**OPINION IN THE COURT BELOW.**

The opinion of the Court of Claims (R. 12, 36) is reported at 77 Fed. Supp. 197.

**Opinions in Prior Proceedings.**

Previous opinion of the Supreme Court of the United States in *U. S. v. Griffin*, No. 63 October Term, 1937, is reported at 303 U. S. 226, 82 L. Ed. 764.

Opinions in prior proceedings are set out in transcript of record in the Supreme Court of the United States, No. 63, October Term, 1937, (303 U. S. 226), *United States of America and Interstate Commerce Commission, appellants v. W. F. Griffin and H. W. Purvis, Receivers for Georgia & Florida Railroad*, appeal from the District Court of the United States for the Southern District of Georgia (App. Ex. 1, R. 57) viz.:

Opinion and Order of the Interstate Commerce Commission May 10, 1933, is reported at 192 I. C. C. 779 (Trans. No. 63 (1937) 9).

Opinion and Order of three judge United States District Court for the Augusta Division of the Southern Judicial District of Georgia, January 23, 1935 (Trans. No. 63, (1937) 57), is set out in Appendix B, p. 60, *infra*.

Opinion and Order of the Interstate Commerce Commission, February 4, 1936 (Trans. No. 63 (1937) 82), is reported at 214 I. C. C. 66.

Opinion and Order of the three judge United States District Court for the Augusta Division of the Southern Judicial District of Georgia February 23, 1937 (Trans. No. 63 (1937) 102), is set out in Appendix B, p. 62, *infra*.

## JURISDICTION.

The judgment of the Court of Claims was entered April 5, 1948 (R. 50). The jurisdiction of this Court was invoked under the Act of February 13, 1925, C. 229, Section 3, 43 Stat. 939, as amended May 22, 1939, C. 140, 53 Stat. 752, 28 U. S. C. A. 288.

Petitions in both No. 135 and No. 198 were granted December 6, 1948 (R. 196).

\* Page references to Transcript in No. 63 (1937) are to the side folio numbers.



## THE QUESTIONS PRESENTED.

The defendant's contentions seem to the plaintiff to pose the following basic question:

*Did this Court err when it upheld the contention of the petitioner, in U. S. v. Griffin (303 U. S. 226), that the respondent's claim presented judicial question of just compensation under the Fifth Amendment which the Court of Claims had jurisdiction to entertain and decide?*

### The defendant's Question 1:

"Whether the Court of Claims has jurisdiction to increase the rates of compensation fixed by the Interstate Commerce Commission under the railway mail pay act of July 28, 1916, which provides that the Commission, after notice and hearing shall 'fix and determine' \* \* \* the fair and reasonable rates and compensation for the transportation of such mail matter'."

The defendant's theory seems to be that the basic question is not one involving the determination of a judicial question of just compensation required by the Fifth Amendment, but is one for the review of legislative regulation of charges of common carriers to shippers.

### The defendant's Question 2:

"In the event there is jurisdiction in the Court of Claims whether the scope of review permits the substitution of the Court's judgment as to what constitutes fair and reasonable rates for that of the Interstate Commerce Commission."

The question which the defendant's question poses is whether in the determination of a judicial question of just compensation required by the constitution the lower Court is bound by arbitrary conclusions of a legislative agency.

### The defendant's Question 3:

"Whether the Interstate Commerce Commission properly refused to increase the mail rates to be paid the plaintiff railroad on the ground that existing rates were fair and reasonable".

To the plaintiff it seems that this involves (1) the question as to whether or not this Court will go behind special findings of fact by the lower Court to review the evidentiary facts, and especially (2) when the defendant has failed either to move that Court for a new trial; or to assign specifications of error to any of such special findings of fact.

### The defendant's Question 4:

"Whether the requirement of the Railway Mail Pay Act that railway common carriers transport mail for 'fair and reasonable compensation', as determined by the Interstate Commerce Commission, constitutes a taking of private property for public use within the meaning of the Fifth Amendment so as to entitle petitioner to recover interest from the United States, as an element of just compensation, for the delay in payment of full compensatory rates."

The plaintiff prefers to state its own questions thus:

(1) Whether the Court of Claims should have allowed interest upon the claim for a compulsory taking of property and services under statutory authority within the meaning of the Fifth Amendment.

(2) Whether the Court of Claims should not have determined compensation under the Fifth Amendment as well as to give effect to an authorized order of the Interstate Commerce Commission as properly construed.

### STATUTES INVOLVED.

The Railway Mail Pay Act of July 28, 1916, 34 Stat. 412 et seq., 39 U. S. C. A. 523 et seq. See Appendix A, p. 55, *infra*.

## STATEMENT.

For a more comprehensive statement of the history of, and the factual details in this case, this Court is respectfully referred to the special findings of fact by the Court below. The following, however, is a summary of the more salient phases:

This case, pursued as *a remedy expressly pointed out by this Court*, is the latest phase of a long continued effort by the plaintiff to obtain relief from an abuse of administrative discretion by the Interstate Commerce Commission in arbitrarily applying a non-compensatory schedule of compensation for carrying the mails under a Procrustean rule advocated by the Post Office Department, instead of a compensatory schedule found by the Commission to be needed upon the result of a jointly agreed upon cost study in order to provide just compensation.

88.92% of the amount of the claim involved is for supplying the Post Office Department with the exclusive use of 15 feet of passenger cars fitted out at the plaintiff's cost as a railway post office, carrying mail matter therein with clerks in charge to sort and handle mail in transit (Finding 4, R. 14, and Finding 21, R. 26). At page 145 of the printed record is a picture of one of these R. P. O. apartments.

11.08% of the claim is on an authorization for the minimum 3 feet of closed pouch service, hauling and having the railroad's passenger train employees take on, put off, and care for in transit, mail pouches and parcel post packages of any quantity which, if piled six feet high (with a passage between), would occupy not more than three linear feet of a passenger car (Finding 4, R. 14, and Finding 13, R. 19).

By the railway mail pay act of 1916 (Appendix A, p. 55, *infra*), the service in question was made compulsory

(Finding 2) and to the Interstate Commerce Commission Congress delegated the duty of fixing schedules of pay which would yield the just and reasonable compensation required by the constitution., *U. S. v. New York Central*, 279 U.S. 76, 78.

On April 1, 1931, being grossly underpaid by the schedule of compensation the Commission had been applying to it,\* the plaintiff, as provided for by the Act, applied to the Commission for an increase in its schedule sufficient to produce just compensation.

In the proceeding which followed the Post Office Department freely admitted (Trans. in No. 63 (1937) 143, 146, 147) that the plaintiff was underpaid, but, nevertheless insisted, for administrative convenience, that the compensation for plaintiff be held down to the same low rates previously prescribed in an earlier proceeding (144 I. C. C. 675) for lines over 100 miles in length based on the average of their costs.\*\*

The Commission, harkening to the desire of the Post Master General not to establish a precedent by prescribing separate schedules for individual lines, disregarded the evidence, and its own finding on that evidence, that an increase of 87.4% was needed; and arbitrarily made an order that

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\* Only 14½ cents per mile for the R. P. O. service, and 4½ cents per mile for the closed pouch service.

\*\* Counsel Neiss for the Post Office Department frankly declared "I just wish to remark that in fixing the rates of pay for the transportation of mail by steam railroads in the large mail pay case, the Commission arbitrarily divided the roads into classes according to their length, and this road falls into Class 1. In fixing the rates for that class the Commission did not try to give a profit to every road, but they were obliged to use an average. It happens, unfortunately, that this road is below the average and, therefore, not making a profit." (Trans. in No. 63 (1937) p. 142.)



the same schedules theretofore prescribed in general, in another proceeding for lines over 100 miles in length, should continue to be applied to the plaintiff, viz., only 14½ cents per mile for 15 foot R. P. O. apartments, and 4½ cents for 3-foot closed pouch service. (R. 25).

For relief from the Commission's arbitrary action the claimant twice sought, by proceedings under the Urgent Deficiencies Act and after hearings, arguments and briefs, obtained from a three judge United States District Court for the Augusta Division of the Southern District of Georgia decrees for injunctions against the Commission's orders as not being in compliance with the duty on the United States to pay "fair and reasonable compensation" and as not being "just and equitable" (Finding 17, R. 24, and Finding 19, R. 19). (See Appendix B, p. 60).

The Commission and the defendant prosecuted an appeal from the said second decree and this Court held thereon that the three-judge District Court did not have jurisdiction, but that there was a proper remedy through the Court of Claims (Finding 20, R. 26).

In the Court of Claims the plaintiffs introduced evidence to support their claim under both heads, viz.:

(a) that the Commission had made an error of law; (b) and that its order was confiscatory (Findings 15 to 23, R. 21 and Findings 24 to 30, R. 28). That evidence consisted largely of the same evidence which had been before the Commission, the principal feature of which was a joint cost study for an agreed upon test period, (which study was conducted upon customary and usual principles approved by the Interstate Commerce Commission)\*, which the Com-

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\* Witness Stephenson, the expert for the Post Office Department testified: "We have nothing whatever to do with the apportionment of operating expenses between freight and passenger, be-

mission itself found to show that an increase of 87.4% would be necessary.

*The lower Court made comprehensive findings of fact, which were unchallenged in that Court either by a motion for new trial or by assignments of error to any of the special findings of fact, and awarded a judgment for the plaintiff in the principal sum of \$186,707.06 (R. 50); but denied interest on the ground that to do so was forbidden by Section 177 Judicial Code as amended, because they were "giving effect to an order of the Interstate Commerce Commission as properly construed", and not determining compensation in an original proceeding under the Fifth Amendment (R. 49).*

The plaintiff is satisfied with the amount of the principal sum of the Court's award as being proper under either

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cause we follow the rule established by the Interstate Commerce Commission. Whether or not that is fair and equitable I do not know. We do not question the rule of the Commission. We accept it as the best basis that the Commission has been able to devise for their own purposes. I have never been able to devise any better basis; I have never tried to devise any better plan. I took the apportionments as I found them. The Post Office Department has never made any attack upon the fairness of that basis." (Trans. in No. 63 (1937) p. 168.)

Q. (By Mr. O'Brien). As to the question which Mr. Hitt asked on cross-examination as to whether or not the Georgia & Florida representative did not express harmony with the adjustments which you had made on the space at the time of the study, upon the basis of a full year's figures was not the fact, Mr. Stephenson, that the adjustments made by the Post Office Department in that respect were satisfactory adjustments, to which they expressed no objection at all, and had no basis for it?

A. It was the most equitable basis that I could devise, and because it was, I think that the representatives of the railroad company accepted that basis". (Trans. in No. 63 (1937), pp. 169-170).

head, but it respectfully submits that on either ground (a) statutory or (b) constitutional, the issue was one for the determination of the just compensation required by the Fifth Amendment, for the taking of property under statutory authority, hence interest is necessary to make just compensation full and complete.

. The judgment awarded by the Court of Claims is equivalent, for the period of this claim, to an increase in its schedule of compensation for the 15 foot R. P. O. service to only 27.17 cents per mile, instead of  $14\frac{1}{2}$  cents, and for the 3 foot closed pouch service of 8.43 cents per mile instead of  $4\frac{1}{2}$  cents.

There is no dispute about the fact that the plaintiff was underpaid, and indeed that such is the fact is now again, in effect, admitted by the defendant's argument in its brief at page 67. - See page 36, *infra*.

In its brief the defendant employs so many highly ingenious interpretations of the facts, and arguments on the law, which are refuted and/or answered hereinafter with a fullness for which the plaintiff offers as its apology the fact that it felt compelled to do so in order to guard against the possibility that this Court might be misled by some of the defendant's mistaken representations.

The defendant's true reason for its opposition is revealed by its contention on page 67 "that Congress did not contemplate, when it authorized general rates, that each railroad whose operating costs exceeded the average would be able to recover additional compensation based on its higher operating costs".

## SUMMARY.

### (A) As to the Defendant's Argument:

The defendant's contentions depend upon certain basic propositions, without which, it seems to the plaintiff, the defendant's citations are not in point and its arguments fall to the ground. Since it also seems to the plaintiff that if the defendant is shown to be mistaken on these propositions this Court needs not go further, each such proposition, as the defendant understands same, is now stated, followed by refutations thereof, as follows:

#### *Defendant's Proposition 1:*

*That neither the Court below nor this Court can consider any of the evidence on which the Interstate Commerce Commission made its reports.\**

#### Plaintiff's refutation:

The plaintiff respectfully submits that on this proposition the defendant is mistaken because: (A) the plaintiff's Exhibit 1 before the trial Commissioner in the Court below was a full copy of the transcript of the record printed under the direction of this Court in case No. 63, October Term (1937), which set forth fully in narrative form the evidence adduced before the Interstate Commerce Commission (R. 62, 63); and (B) The defendant has overlooked the fact that this Court may take judicial notice of its own records.

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\*From footnote on page 3 of the typed copy of defendant's brief furnished plaintiff but later deleted:

"Since the evidence upon which the Commission based its findings has never been before this Court and was not before the Court below, the railroad cannot challenge their validity on the ground that they are not supported on the record."



*Defendant's Proposition 2:*

*That the "reasons" or "circumstances" advanced by the Commission to justify its disregard of the results of the agreed upon cost study were findings of fact on the evidence, the validity of which cannot be challenged.*

*Plaintiff's refutation:*

(A) As has already been shown the evidence before the Commission on which the Commission made its reports is before this Court by virtue of judicial notice, and was in evidence before the lower Court, hence the validity of any "reasons", "factors", or "circumstances" alleged to be a finding, or any findings allegedly made by the Commission in that proceeding in derogation of the soundness of the cost study can be, and have been, properly challenged as being unsupported by the evidence since that evidence is before this Court and was before the lower Court.

*Defendant's Proposition 3:*

*That the defendant is entitled to challenge the special findings of fact by the lower Court.*

*Plaintiff's refutation:*

(A) As has already been shown, the evidence upon which the Commission made its reports, together with those reports, were in evidence before the lower Court and are in evidence, and was considered and disposed of in the special findings of fact by the lower Court.

(B) The defendant filed no motion for new trial in the lower Court to question the correctness or the sufficiency of the Court's conclusions on its findings of fact, or to amend the same.

(C) The defendant failed to assign any specifications of error which specify with minuteness, or otherwise, the fact

or facts which it regarded as erroneously found or erroneously omitted to be found by the Court.

*Defendant's Proposition 4:*

*That the evidence upon which the Interstate Commerce Commission made its reports and orders was not before this Court when it rendered its decision and report in U. S. v. Griffin, 303 U.S. 226.*

*Plaintiff's refutation:*

(A) As has already been shown this Court did have before it in full narrative form the evidence which was before the Commission; and

(B) This Court after previously having heard argument upon the law, set a second hearing expressly for argument upon the merits, hence its decision in *U. S. v. Griffin, supra*, was rendered in the light of the arguments upon the merits.

*Defendant's Proposition 5:*

*That the decision by this Court in U. S. v. Griffin, supra, did not decide that the Court of Claims would have jurisdiction to entertain this claim on dual grounds, but was mere obiter dicta.*

*Plaintiff's refutation:*

(A) The lower Court expressed its opinion on this proposition as follows:

"The defendant urges that the above-quoted statements of the Supreme Court are obiter. We do not think they are, but even so, what is said by way of obiter may nevertheless be good law."

(B) In any event, as has been shown in connection with Proposition 4 immediately preceding, this Court made its decision after second hearing for argument upon the merits, hence it was in the light of the evidentiary facts that it ruled that the Court of Claims would have jurisdiction.

*Defendant's Proposition 6:*

*That the claim does not involve the determination of a judicial question.*

*Plaintiff's refutation:*

(A) This proposition is in conflict with the holding of this Court in *U. S. v. New York Central*, 279 U.S. 76, 78, when it said, *inter alia*:

"The question is one of construction which requires consideration not of a few words only, but of the whole act of Congress concerned. This is the Act of July 28, 1916, chap. 261, § 5, 39 Stat. at L. 412, 425-431, (U.S.C. Title 35, Chap. 15, where the long § 5 is broken up into smaller sections) which made a great change in the relations between the railroads and the government. Before that time the carriage of the mails by the railroads had been regarded as voluntary (*New York, N. H. & H. R. R. Co. v. United States*, 251 U.S. 123, 127, 64 L. ed. 182, 193, 40 Sup. Ct. Rep. 67); now the service is required (U.S.C. Title 30, § 541); refusal is punished by a fine of \$1,000 a day (U.S.C. Title 39, § 563), and the nature of the services to be rendered is described by the statute in great detail. *Naturally, to save its constitutionality* there is coupled with the requirement to transport, a provision that the railroads shall receive reasonable compensation." (Italics supplied)

*Defendant's Proposition 7:*

*That even though admitting that the Commission's order would leave the plaintiff underpaid it would still not be confiscatory because a similar result has been held not to be unreasonable in regulating the rates and fares of common carriers.*

\* Where an average of costs is computed, it is reasonable to expect that the costs of approximately one-half the railroads will exceed the average and the remainder will fall below it. On the theory of the court below, a general order fixing rates on some such a common denominator basis would in effect fix rates for only

### Plaintiff's refutation:

(A) As has already been pointed out, this Court has already held in *U. S. v. New York Central*, 279 U.S. 76, 18, and in *U. S. v. Griffin*, 303 U.S. 226, as well, that the fixing of compensation under the Mail Pay Act is one for the determination of a judicial question of just compensation, the right to which is constitutionally protected.

(B) Furthermore, in the nature of things the legislative determination of rates for common carriers is controlled by other paramount considerations not here present, particularly including the reasonableness of rate schedules as between competitive producers and markets, even though the remedying of inequality and discriminations result in some rates which do not yield sufficient compensation.

### Defendant's Proposition 8:

*That the compelled transportation of mail was merely the regulation of one phase of the general obligation laid by law upon all common carriers to transport everything offered by anybody.*

### Plaintiff's refutation:

(A) There is no such general principle of law, as common carriers can be, and often are, quite selective in the kinds of traffic which they will or will not handle. Defendant is probably confused by the rule of ~~law~~ that for those kinds of traffic which it holds itself out to handle a carrier must do so for all alike.

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half the railroads. Those performing better than average would be permitted to retain their better than average compensation and those performing worse than average would be permitted to recover additional compensation. It is inconceivable that the statutory provision for general rates contemplated, or any rule of law requires, this result."



*Defendant's Proposition 9:*

*That this case is one for the review of action of an administrative agency in the regulation of the fares and charges of common carriers, over which the Court of Claims can have no jurisdiction.*

**Plaintiff's refutation:**

(A) As has already been pointed out, this theory flies directly in the face of the decisions of this Court in *U. S. v. New York Central, supra*, as well as in *U. S. v. Griffin, supra*.

**(B) As to the Plaintiff's Argument:**

It is the plaintiff's position, in general, that it has no criticism to offer of the special findings of fact or the opinion, and the judgment in the amount of the principal sum of its claim; but the lower Court erred only in connection with its failure to award interest in order to make its compensation just and complete under the Fifth Amendment.

*As to the facts:* for a fair and neutral account of the factual side of this case the plaintiff relies greatly upon the special findings of fact by the lower Court (R. 13 to 46).

The defendant, however, portrays the facts so differently and so mistakenly that, being apprehensive that some of them might be prejudicial to its cause, the plaintiff submits a refutation thereof as its Appendix C, beginning at page 68, *infra*.

*As to the law:* the plaintiff has found some difficulty in following all the threads of the defendant's arguments in logical relation to either the defendant's enumeration of the questions which it conceives to be involved, or to its specifications of errors, but as to them the general scheme of the argument herein following is to answer the defendant's contentions on each of the specifications of error so far as it can identify the arguments of the defendant in relation to its specifications.

## THE ARGUMENT.

### On the Facts.

The plaintiff has no need to argue on the facts as set out in the special findings of fact by the lower Court. Therefore, the only need for factual argument by the plaintiff is that created by the defendant's manner of representing numerous facts in a light which the plaintiff does not believe to be either correct or fairly justified. To avoid burdening the main part of the brief too much the plaintiff's refutations on most of such mistaken points of fact are put into Appendix C at page 68, *infra*.

To illustrate the plaintiff's criticism by example, one striking instance should be pointed out here, viz., in the matter of the 30 foot fallacy:

On pages 11 and 63 of its brief the defendant represents that in the cost study there was "included in the unused space allocated to the mail service part of the excess space in a 30 ft. R. P. O. apartment which was furnished at various times when a 15 foot apartment was authorized"; and that "the elimination of this excess unused space alone which was furnished solely to serve the convenience of the carrier, might have resulted in a profit from the transportation of the mails even on the railroads theory of cost determination".

In short, this representation is simply not correct, as the following reasons demonstrate:

In the first place the sum of the plaintiff's claim was reckoned upon the basis of the results of the jointly agreed upon cost study which depended upon a joint field test for 28 days in 1931 of actual proportionate use of passenger train space by each kind of passenger train service. Obviously, therefore, the furnishing at any later time of a 30 foot R. P. O. apartment on a requisition for only 15 ft. could not possibly affect the calculation.

In the second place, the test to develop the proportions of the respective usages of space on passenger trains was conducted under the supervision of experienced representatives of the Post Office Department. It is inconceivable that any factor which might have a serious effect upon the cost study could have escaped their scrutiny, but there is not the slightest scintilla of evidence to indicate that during the said entire test period an R. P. O. apartment of 30 feet was furnished in lieu of the authorized 15 feet R. P. O. car.

In the third place the Post Office Department experts know better, having never made any such contention as that now voiced by the defendant.

In the fourth place, the only color of justification the Commission had for so making such a statement was that on the further hearing after the first injunction, witness Fulghum, for the Post Office Department, in describing an inspection trip made by him over the Georgia & Florida *some two years after the time of the test period*, testified, incidentally, that *on that occasion* a 30 ft. R. P. O. apartment had been furnished when the requisition was for only 15 ft., and, he thought, that practice was then regular. The witness attached no particular significance to that fact. When questioned, he said that, while the department preferred to have the size it ordered it entered no objection when oversize space was operated. (Trans. in No. 63, of 1937, f. 172).

In the fifth place, even if a 30 foot apartment had been furnished during the test period, it still would not have affected the accuracy of the cost study because that field study showed that there was an excess of more than 15 feet of waste space anyhow. Hence, it could make no difference if the waste space to be apportioned was inside or outside of the partition which separated the R. P. O. apartments

from the rest of the car. That this is so was demonstrated in plaintiff's Exhibit 21, both mathematically and by a graph (R. 151).

Of this fallacious contention, when urged upon the three judge District Court in the second trial, it said:

"Further argument of the Commission, as we understood it, is that because 30 feet instead of 15 feet is partitioned off for mail this adds 15 feet to the unused space for which the post office department pays a part. We do not so understand the testimony. Our understanding is that the unused space is the same wherever the partition be placed." (Appendix B, pp. 62, 66.)

Furthermore, the District Court, in that second decision, quoted with approval its findings in its first decision that "There is no attack upon the efficiency of the operation of this railroad"; "There is no charge of extravagance" (Pl. Ex. 1, p. 56); and "There is no criticism of the character of the service performed in connection with transporting the mail". (Pl. Ex. 1, p. 57).

When this same contention was pressed upon the Court of Claims it, in effect, rejected same in Finding 21 when it said only that:

"The plaintiffs had acquired and operated some cars with a 30 ft. R.P.O. apartment, which at various times were furnished, to the Post Office Department when a 15-foot space was ordered. In such event the postal clerks used only 15 feet of the 30-foot apartment, leaving the remainder unused, and the plaintiffs were paid on the basis of the rate for a 15 foot R.P.O. apartment", R: 26).

To that finding no specification of error was assigned. The Commission's blunder may have been due to its over eagerness to exculpate itself after being put in an adversary position by the first injunction of the three judge Court, but the fact that, although it was put on full notice of this fal-



lacy in plaintiff's brief in opposition to the defendant's petition for writ, the defendant should now reiterate this error demonstrates the need for great care in entertaining its versions which add to, qualify, differ from, or depart in any way from the special findings of fact by the lower Court.

### Argument on the Law.

#### Defendant's Specification of Error No. 1:

*"In holding, in effect, that under the Railway Mail Pay Act of 1916, it had, in the circumstances of the present case, jurisdiction to determine fair and reasonable compensation for transporting the mails"*.

When the same cause of action was before this Court in *U. S. v. Griffin*, 303 U. S. 226, the defendant contended, and was upheld in its position by this Court, that the issue did involve the judicial question of just compensation, hence *was not a review of legislative rate making* within the jurisdiction of a three judge district court under the Urgent Deficiencies Act. In that case when the same essential facts were before it, this Court was at pains to expressly declare that the Court of Claims did have jurisdiction if (1) an appropriate finding of reasonable compensation had been made by the Commission but an order of payment had been withheld because of an error of law, and (2) if the Commission's order was confiscatory.

(1) As to the jurisdiction under the first head: The evidence is perfectly clear that the Commission did make an appropriate finding of reasonable compensation; and it failed to give any effect whatsoever to that finding, which was an error of law. It added another error of law by capriciously picking an old schedule out of an old case, and arbitrarily imposing it on this plaintiff. This is manifest in the very phraseology of both of the Commission's orders viz.:

"It is ordered, that the rates of pay for the transportation of mail matter established in Railway Mail

Pay, 144 I.C.C. 675, for railroads over 100 miles in length be, and they are hereby, established as fair and reasonable rates to be received by the applicant herein for services rendered on and after April 1, 1931." (Trans. in No. 63, (1937) p. 10, 51).

(2) The lower Court's jurisdiction under the Tucker Act on the ground of confiscation is equally clear. The evidence showed beyond any reasonable doubt that the rates ordered by the Commission were confiscatory. Indeed, in effect, the defendant admits it by its own specification of error No. 3.

Apparently the defendant, now reversing its former position, argues to avoid the force of the decision of this Court in *U. S. v. Griffin, supra*, now contends that this Court decided only that the three judge Court did not have jurisdiction under the Urgent Deficiencies Act because (1) the Commission's order was "negative"; and (2) there was no wide public interest in the speedy determination of the validity of mail pay orders. However, it was in that case this Court went on to say:

"The absence in the Railway Mail Pay Act of a provision for judicial review and the denial of jurisdiction under the Urgent Deficiencies Act do not preclude every character of judicial review. If the Commission makes the appropriate finding of reasonable compensation but fails, because of an alleged error of law, to order payment of the full amount which the railroad believes is payable under the finding, the Court of Claims has jurisdiction of an action for the balance, as the claim asserted is one founded upon a law of Congress. *Missouri Pacific R. Co. v. United States*, 271 U. S. 603. Compare *United States v. New York Central R. Co.*, 279 U. S. 73, affirming 65 Ct. Cl. 115, 121. And since railway mail service is compulsory, the Court of Claims would, under the general provisions of the Tucker Act, have jurisdiction also of an action for additional compensation if an order is confiscatory. *United States v. Great Falls Mfg. Co.*, 112 U. S. 645; *North American Transportation & Trading Co.*

*v. United States*, 253 U. S. 330, 33; *Jacobs v. United States*, 290 U. S. 13, 16. Moreover, as district courts have jurisdiction of every suit at law or in equity 'arising under the postal laws,' 28 U.S.C. § 41 (6), 'suit would lie under their general jurisdiction if the Commission is alleged to have acted in excess of its authority, or otherwise illegally. Compare *Powell v. United States*, 300 U.S. 276, 288, 289. But a suit under the Urgent Deficiencies Act to set aside an order concerning mail pay is not primarily one against the Commission. Primarily, it is a suit against the United States. And the United States can be sued only when authority so to do has been specifically conferred.

"The Railway Mail Pay Act does not confer that authority."

As the lower Court also held in its opinion

"In *New York Central Railroad Co. v. United States*, 65 C. Cls. 115, affirmed on Appeal, 279 U. S. 73, which was a suit for mail pay as fixed by the Interstate Commerce Commission from the date of filing of application with that Commission for readjustment of compensation, this court took jurisdiction because the carrier was 'asserting a claim founded upon a law of Congress'. The Act of July 28, 1916, 39 Stat. 412, was involved as here. But with reference to the power and jurisdiction of the Commission this court said: Congress 'erected a tribunal or accepted one already in existence to discharge a duty which was judicial in its nature, the ascertainment of reasonable compensation to carriers for services exacted by statute,' citing *Monongahela Navigation Co., v. United States*, 148 U. S. 312, 327, to the effect that when a taking has been ordered, then the question of compensation is judicial." (R. 41.)

Furthermore the petitioner's theory is squarely in conflict with what this Court expressly declared in *U. S. v. New York Central*, 279 U. S. 76, 78, when it said:

"Naturally, to save its constitutionality there is coupled with the requirement to transport, a provision

*that the railroads shall receive reasonable compensation."* (Italics supplied)

Incidentally, where at page 28 of its brief, the defendant contends that "The Railroad's action was not based on an order of the Commission", the defendant admits the Court of Claims would have jurisdiction of an action to recover compensation based upon rates fixed by the Commission which had not been paid because of an error of law. If, however, the defendant means to draw a distinction between the words "finding" and "order" in an action for a balance where the Commission has made an appropriate "*finding*" of reasonable compensation, but fails to order payment of the full amount, it is pointed out that this Court used the word "finding" and not the word "order" in *U. S. v. Griffin, supra*.

In any event the defendant's argument on this point rests basically upon the same erroneous concept that this is a proceeding for the review of the action of an administrative agency in its capacity as a legislative agent for the regulation of the schedules of common carrier charges for the transportation of freight and passengers.

At page 30 of its brief the defendant argues ingeniously and at length for what, in effect, is the novel proposition that the railway mail pay act is not what this Court said it was as a Post Office and Post Roads Act, but is merely a statute for the regulation of the fares and charges of railroads in their capacity as common carriers. However, there is nothing in the defendant's argument or citation of cases and legislative history in support of its contention that is in any way inconsistent with what has up to now been the view commonly prevailing and which has seemed to be the conviction of this Court that these are two separate and distinct fields of law.

If this is the carrying out of the prophesy that perhaps the defendant might make some new law in this case (R.



102) the plaintiff hardly cares to follow that lead, for it looks like the defendant is confused by the irrelevant fact that it is a common carrier. Like the bewildered express agent in Ellis Parker Butler's little classic "Pigs is Pigs", it does not seem to apprehend that there is any difference between rates for common carriers and rates of pay, rates of speed, and birth rates; and that in some aspects, some rates present legislative issues, and in others judicial question. In any event, the plaintiff respectfully submits that merely because the Congress selected the Interstate Commerce Commission as the medium for determining the basis and measure of the prices for the units at which should be reckoned the amounts necessary to pay just compensation for the taking of property by the Government, and the term employed to designate such prices is the word "rates"; and that those from whom the use of property are taken are common carriers, in no way changes the fact that the use of the property and service was compelled under statutory authority subject to a constitutional duty to pay just compensation.

On page (37) under the heading, "THE COURT OF CLAIMS HAS NO POWER TO FIX RATES UNDER THE RAILWAY MAIL PAY ACT OR TO ORDER REVISIONS OF THE COMMISSION'S RATE ORDERS", the defendant proceeds with the elaboration of its argument that the Court of Claims lacks jurisdiction to entertain this claim, (notwithstanding the opinion of this Court in *U. S. v. Griffin*, 303 U.S. 226.) It does not seem to the plaintiff that this extension of the defendant's argument, along with the cases cited, are in point because of the lack of any foundation for the proposition that this claim is not one for just compensation within the protection of the constitution. Here, as the lower Court well said:

"The duty of the Commission extended beyond that of establishing rates. The statute went further and required the Commission to fix fair and reasonable compensation to the individual carrier. It had to be

the *individual* carrier, for otherwise the term "compensation" is meaningless. Only in the event that they were "just and equitable" could the Commission "fix general rates applicable to all carriers in the same classification". 39 Stat. 412, 430. Rates are not just and equitable that give one carrier a net revenue and impose upon another carrier, in the same class, a deficit." (R. 48).

At page (42) the defendant under the heading of "THE JURISDICTION OF THE COURT OF CLAIMS CANNOT BE PREDICATED ON A THEORY OF EMINENT DOMAIN", displays great diligence in its review of early cases, beginning at a time when rate cases were considered to be governed by principles applicable to the law of eminent domain, and down to a later time when that view became reversed, but to the plaintiff it seems irrelevant and immaterial unless some new law is made. Incidentally, however, the defendant makes the statement in the course of its argument, that the Court of Claims was clearly correct in holding that the determination of reasonable rates for transporting mail did not involve a taking of private property for public use; but it failed to cite any page or pages in the record upon which it relied as its authority for that statement:

While the lower Court did say, in making its award, it was "giving effect to an order of the Interest Commerce Commission, as properly construed, and not determining compensation in an original proceeding under the Fifth Amendment", but in no place in its opinion did it hold that as a matter of fact and law there was no taking of property for public use. To the contrary, at page 33, it stated that "this was not the first case in which dual or alternate grounds for jurisdiction were considered", and quoted what this Court had itself said in *New York Central R. Co. v. U. S.*, 65 Ct. Cl. 115, with reference to the power and jurisdiction of the Commission, that "Congress 'erected a tribunal or accepted one already in existence to discharge a

duty which was judicial in its nature. \* \* \*. Citing *Monongahela Nav. Co. v. U. S.*, 148 U. S. 312, 327, to the effect that, when a taking has been ordered, then the question of compensation is judicial. (Italics supplied.) (R. 42) And the lower Court further said:

"A deficit in net railway operating income from the carrying of the mail is, on its fact, confiscatory. That must be conceded. It is a simple proposition that needs no support and must be accepted as obvious." (R. 42.)

And also that Court said:

"\* \* \* the Commission has by its findings, using its adopted plan and its own methods as applied to plaintiffs' circumstances, proved that plaintiffs have been underpaid \$186,707.06 in fair and reasonable compensation for the period in question. See Finding No. 23 (R. 48).

\* \* \*

"\* \* \* The reasons given by the Commission for not ordering payment, on the basis of its findings, of the annual sums making up the above total of \$186,707.06, are not convincing or even persuasive. In our opinion they all overlook the statutory mandate that the compensation to be allowed for carrying the mails must be reasonable, and the constitutional one that it must be just." (Italics supplied) (R. 48).

Furthermore, the lower Court expressly pointed out that:

"The carrier had no choice in the matter. That which protected the carrier was the provision for 'fair and reasonable compensation', and, of course, the Fifth Amendment" (R. 37).

It is respectfully submitted that even though the lower Court did purport to rest its award upon the statute, that statute simply implemented the constitutional duty to pay just compensation.

## Defendant's Specification of Error No. 2:

*"In holding that on the facts as found and stated by the Interstate Commerce Commission, there is an erroneous conclusion of law by the Commission that the railroad has been fairly and reasonably compensated for their mail service."*

In the first place the lower Court did not summarily reject the Commission's so-called "factors" or "circumstances" but weighed them and found them wholly wanting in merit. That it did do so is proven by the lower Court's full and comprehensive special findings of fact; and also in its opinions, as the following quotations therefrom show beyond any doubt:

*"The deficit found in plaintiffs' mail operations was ascertained according to the formula suggested by the Government and used by the Commission to prescribe rates for general application. As we have pointed out, the ascertainment of fair and reasonable compensation must proceed from a fair and reasonable basis. The Commission has, by its use of Plan No. 2, adjudged it to be a fair and reasonable basis. And out of that basis there has been ascertained, by formulae prescribed by the Commission, what is the fair and reasonable compensation for plaintiff's carriage of the mails beginning the first of April 1931, and ending at the close of February 1938. Fair and reasonable compensation cannot be both a deficit and the amount of \$186,707.06 so found. It is, we conclude, the latter."*  
(R. 46)

*"The Commission's decision of May 10, 1933, 192 I. C. C. 779, states its position with reference to plaintiff's claim as follows:*

*"The cost study is not considered to be an accurate ascertainment of the actual cost of service. It is an approximation to be given such weight as seems proper in view of all the circumstances. See *Railway Mail Pay, supra*. The comparison of mail revenue with other revenue received for services in passenger-train operations shows that mail with relation to the other*



services is bearing its fair share of the expenses of operation and is contributing relatively more than the other services for the space furnished. Applicant receives the same rates as those received by other roads for the same kind of service. Many of these other roads are, as applicant points out, roads which are very much larger and which have greater traffic and lower unit operating costs. On the other hand, many are in much the same situation as the applicant in respect of passenger-train operations. The data submitted fail to justify giving the applicant rates higher than those now paid other railway common carriers for like service."

"We quote rather than paraphrase this, for what it says is important. We are of the opinion that the "approximation" should be given greater weight than the Commission affords it, because, as we have said, and the Commission in effect admits, there is no such thing as certainty in actual cost. Approximate, or as it is called, "Computed" cost must be relied upon, and as a matter of law must be decisive. Of course, there were other methods of computing cost, but the Commission, put to the choice, selected Plan No. 2. And it did not, in the decision of May 10, 1933, abandon Plan No. 2 and select another."

The fact that the plaintiffs' railroad "receives the same rates as those received by other roads for the same kind of service", is not responsive to the plea that those rates, as to the plaintiffs, are confiscatory. The service is compulsory, economy and efficiency of operation are undisputed. This is not a case where the carrier may cut down its expenses and thus convert the remuneration into one that is fair and reasonable. It has already reached the efficient and economical stage, and if it must carry the mail, the remuneration must fit that situation. Here it has not done so." (R. 46-47).

"The rates authorized by the Commission were based on a grouping together and then given particular application without change. It did not follow that rates, fair and reasonable for an average road (which

in fact did not exist), would be fair and reasonable for all existing roads. The statute required more than mere rates, it required fair and reasonable compensation and the duty of fixing upon and authorizing payment of fair and reasonable compensation in any particular case could not be avoided because of the magnitude of the task, or because some other methods of calculation, which, although neither approved nor adopted, might possibly give other results.

There is no presumption that the average is true of the particular. The presumption is otherwise, and the plaintiffs, having shown their railroad to be in a comparatively low scale, and thus distant from the average, had no great burden of proof before them in presenting their case to the Commission. It was for the Commission to demonstrate that the general rates prescribed gave the plaintiffs a fair and reasonable return. This the Commission failed to do. More than that, the Commission has by its findings, using its adopted plan and its own methods as applied to plaintiffs' circumstances, proved that plaintiffs have been underpaid \$186,707.06 in fair and reasonable compensation for the period in question. See Finding No. 23. (R. 48)

If that which the Commission determined is fair and reasonable compensation for the representative road, it must, we think, be fair and reasonable for any one road that is so represented. The reasons given by the Commission for not ordering payment, on the basis of its findings, of the annual sums making up the above total of \$186,707.06, are not convincing or even persuasive. In our opinion they all overlook the statutory mandate that the compensation to be allowed for carrying the mails must be reasonable, and the constitutional one that it must be just." (R. 48).

Furthermore, the four judges on the lower Court were not alone in their dim view of the "reasons" or "circumstances" given by the Commission by way of attempting to exculpate itself for its arbitrary action. What the three judges on The District Court said, and appears in full in Appendix B, pp. 60, 61, 66; *infra*.

In the second place, the cases cited by the defendant are not in point for the same reason, already hereinbefore given, i. e. that the defendant has gone astray upon the mistaken predicate that this case was not for the determination of the judicial question of just compensation under the constitution, but, instead, was one for the review of an act of legislative rate making.

### **Defendant's Specification of Error No. 3:**

*"In holding that the mail rate fixed by the Interstate Commerce Commission was confiscatory and did not fairly and reasonably compensate the railroad."*

In support of its specification 3 the defendant, beginning at page 59, asserts that the Court below erred in holding (1) that fair and reasonable rates must be determined by application of a particular formula which compelled compensation for abnormal amounts of space not devoted to the transportation of the mail; and (2) that the "factors" relied upon by the Commission to disregard the results of the cost study were intrinsically sound.

The plaintiff replies that neither of these propositions is correct. No. 1 has already been refuted at page 27, *supra*, and likewise, No. 2 has been dealt with at pages 17 and 68, *supra*, to which reference is made to save repetition.

On page 59 the defendant, continuing its argument, asserts that the lower Court "erroneously assumes or asserts that the Commission had adopted Plan 2 as the proper method of determining cost and investment", but the respondent respectfully submits that the lower Court made no such error. Its findings, and its opinion, show that it clearly understood the nature of Plan 2 as a part of the cost study; and also that they knew full well that the Commission had rejected *the result* of the cost study; as well as the reasons why the Commission did so. This is evident in the very careful and comprehensive special findings of

fact, and in the following further quotation from the Court's opinion:

"Railroad expenses are not generally applicable as direct costs but require apportionments. The Commission did not, under Plan 2, which it adopted and which we must accept, determine actual costs of various operations. For the year 1931 the total operating costs of plaintiffs' road were found to be \$1,449,801. Of this sum 21.74%, or \$315,273, was determined to be apportioned to passenger train service in which the mail traffic was served. Based upon the space used or hired, the Commission determined total expenditures applicable to the mail service of \$40,673. As against these expenditures, the plaintiffs' road had a deficit in this test period of \$4,945, which indicates that its gross mail revenues were \$35,728. In other words, the mail revenues were \$4,945 less than the operating expenditures applicable to the mail service, which resulted in such deficit." (R. 44).

Continuing, on page 59 the defendant asserts that, in its first report in 1933 on the request for re-examination of the mail rates paid the railroad, the Commission pointed out that the cost formula which it had used in originally fixing rates was not "an accurate ascertainment of the actual cost of service", but was merely "an approximation to be given such weight as seems proper in view of all the circumstances".

The respondent again respectfully submits that the special findings of fact well show that the lower Court fully and correctly understood the nature of the cost study. The court discussed this proposition very clearly, and in its opinion, among other things, said:

"A deficit in net railway operating income from the carrying of the mail is, on its face, confiscatory. That must be conceded. It is a simple proposition that needs no support and must be accepted as obvious. But, if we correctly read the decision of the Commission in



the plaintiffs' case, reported in 192 I.C.C. 779, *supra*, the Commission's position is that the deficit of \$4,945 is a 'computed' deficit, not necessarily an actual deficit, and therefore not to be taken as 'confiscatory', although the Commission does not use that term.

The trouble with this argument is that a deficit in net railway operating income from mail is always necessarily 'computed'. Actual loss or actual deficit in such income is an *ignis fatuus*. This must be so until the method of arriving at a deficit receives authoritative if not common acceptance. The Post Master General himself proposed three alternative plans, which itself indicates lack of an absolute rule. (R. 42).

. . . . .

"We thus see that ascertainment of 'actual' as applied to plaintiffs' cost in the transportation of the mail, had no prospect of realization. The cost had to be a 'Computed' cost in any event. But had we the actual cost it would serve only as a guide, a cost to be considered, but not necessarily to govern, in arriving at fair and reasonable compensation. The question is, rather: What is the fair and reasonable cost? For we cannot proceed from an unfair and an unreasonable cost toward a fair and reasonable compensation.

Here, however, it is found that 'there is no evidence which indicates that plaintiffs' operating costs were excessive in relation to the character of the road and the traffic area, or that such costs were increased by inefficiency, negligence, or uneconomical management of operation by the plaintiffs.'"

Nowhere in the Commission's findings or conclusions in plaintiffs' case do we find even an intimation that the so-called 'actual' cost, whatever it might be, was anything but fair and reasonable." (R. 43):

Continuing, on page 60, the defendant asserts that it was "crystal clear" that the Commission had rejected Plan 2 when it gave controlling consideration to other factors than the results of the cost study. Petitioner is mistaken, as Plan 2 has never been rejected, but, to the

contrary, has been relied upon fully by the Commission in finding the results of cost studies in every mail pay case, including the present. (Finding 8, R. 16).

What the defendant probably had in mind was that the Commission rejected the *results* of the cost study, of which Plan 2 was an integral part. If so, *that argument is equivalent to an admission that the Commission disregarded the evidence*, for that cost study was, in the main, *the evidence relied upon by both sides*.

What the Commission itself said was:

" \* \* \* The method is described in Railway Mail Pay, supra. In this plan, referred to here and in the prior proceeding as Plan 2, car-miles and car-foot miles of operation in cars employed exclusively for one service are referred to as full cars, whether loaded or not, and the entire operation of each is allocated to the service to which it is assigned." The space in combination and mixed cars is allocated to each service, according to the space used, except that space authorized for mail is regarded as space used. The unused space in such cars is apportioned in proportion to the space used.

The car-foot miles of service in the test period of 28 days was equivalent to 82.78 per cent of the car-foot miles for a 28-day period computed from the total car-foot miles actually operated throughout the year 1931. The department therefore adjusted the space data to reflect the actual operation for the year. This resulted in a space ratio for mail under Plan 2 of 12.96 instead of 15.03. The ratio for passengers, including baggage and miscellaneous, is 80.35 and for express 6.69. The applicant while criticizing the adjustment does not contest it." (192 I.C.C. 779, 781).

The Commission then went on to find that, *using Plan 2*, the joint cost study extended to the year 1931 as adjusted, showed that the computed deficit in net railway operating income from mail was \$4,945; and at a rate of 5.75% the

return on the investment in road and equipment allocated and apportioned to mail would amount to \$26,282, and to meet these combined amounts would require an increase in compensation of 87.40%. (192 I.C.C. 779).

Continuing at page 60 defendant asserts that in other mail pay cases the Commission has given "consideration" to other "factors" besides the cost study. The generally worthless character of the other "factors" claimed to have been "considered" has already hereinbefore been pretty generally exposed at pages 17 and 68 et seq., to which reference is made to save repetition.

The plaintiff would have no quarrel with the proposition that it is relevant to take into consideration any material factors which may be a matter of proper evidentiary record, or of which judicial notice may properly be taken, along with the cost of the service, but does respectfully submit that the correct rule of law was well stated in the opinion of the three judge Court, February 23, 1937 when they said:

"What elements may have been persuasive 'In other mail proceedings' are not necessarily to be considered here, and should not be in the absence of supporting testimony and some indication as to what weight was given each element." (Appendix B, p. 65).

At page 62 the defendant cites the recent case of *Ayrshire Collieries Corp. v. United States*, No. 25 this Term, Decided January 3, 1949, as authority for the proposition that "it is no longer open to dispute that in the determination of a *fair and reasonable rate* it is appropriate to consider other factors than the cost of providing the service and the rate of return on the investment employed in providing the service." (Italics supplied).

The plaintiff has no quarrel with the principles on which the *Ayrshire Collieries Corp.* case was decided, but it is not

applicable here. In other words, the defendant has admitted that the plaintiff was underpaid, but attempts to justify that denial of just compensation on the authority of the Ayrshire decision, but the difficulty with that argument and that citation is as elsewhere, that it is not in point because here it is not a rate case of that kind. The Ayrshire case is just another illustration of the cogency of some of the reasons why the fixing of rates to be charged by common carriers should and must be determined on other principles than those which govern the determination of just compensation. As the Ayrshire case makes clear, the issues in a rate case ordinarily have little relation to whether or not the rates to be paid by shippers will produce just compensation, but turn more upon questions of discrimination and comparative reasonableness, as affected by competition between rival commodities, rival shippers, rival markets, and rival carriers. These cost studies are mainly useful as a guide to the limitation of rates to a general level which, though not compensatory in themselves, will not fall below bare "out-of-pocket" costs.

In any event, what a Commission may or may not do, in any ordinary rate case is quite immaterial here, because this is a case where the right to just compensation is protected by the Fifth Amendment.

On pages 63, 64, 65, 66 and 67 the defendant again represents many of the "reasons" or "circumstances" or "factors" advanced by the Commission to justify its arbitrary disregard of the cost study as though they were findings supported by evidence, when such is not the case, as is amply demonstrated in Appendix C hereto (p. 68, *infra*).

If the defendant had any real confidence in the correctness, relevance, materiality and weight of these "factors", it was derelict either in its duty in failing to put it in evidence to support same, or if it was in evidence, to move



the lower Court for a new trial. If it believed that the evidence would support any of its present versions it should have assigned a specification of error either of commission or omission to each instance in which it claims the special findings of fact are contrary to the evidence. The defendant seems to be under the impression that the evidence before the Commission is not before this Court, and was not before the lower Court, so that it had a free hand in portraying the Commission's conclusions as though they were findings supported by evidence. Indeed it practically said as much in a footnote on page 64 of the printer's proof of its brief: "Since the evidence upon which the Commission based its findings has never been before this Court and was not before the court below, the railroad cannot challenge their validity on the ground that they are not supported on the record."

The defendant evidently concluded that this admission was too significant, of possibly it discovered after all that the evidence was before this Court in case No. 63, October Term (1937) in the form of a full narrative transcript prepared by itself, and that plaintiff's Exhibit 1 in the Court below was a copy of this Court's print of that same transcript (R. 57).

The underlying concept upon which the defendant's contentions are founded is expressed at page 67 of its brief, thus:

"Where an average of costs is computed, it is reasonable to expect that the costs of approximately one-half the railroads will exceed the average and the remainder will fall below it. On the theory of the court below, a general order fixing rates on some such a common denominator basis would in effect fix rates for only half the railroads. Those performing better than average would be permitted to retain their better than average compensation and those performing worse than average would be permitted to recover additional

compensation. It is inconceivable that the statutory provision for general rates contemplated, or any rule of law requires, this result." (See *Bowles v. Willingham*, 321 U. S. 503, 518; *New England Division Cases*, 26 L. U. S. 184).

The plaintiff respectfully submits that the defendant is greatly mistaken in this concept for it is not only manifestly a denial of equal justice under the law, but flies in the face of the prohibitions of the Fifth Amendment, and, contrary to the defendant's contention, it flouts the will of Congress. It is simply not true that Congress did not contemplate, when it authorized general rates, that any railroad whose operating results exceeded the average would be *compelled* to perform service at less than cost. To the contrary, Congress expressly provided for remedying any such situation by the following clause in the Railway Mail Pay Act:

"Either the Postmaster General or any such carrier may at any time after the lapse of six months from the entry of the order assailed apply for a re-examination, and thereupon substantially similar proceedings shall be had with respect to the rate or rates for service covered by said application, provided said carrier or carriers have an interest therein. (28 U. S. C. 553)." (Appendix A, pp. 55, 59, *infra*.)

To repeat it was on this point that the Court of Claims well said:

"The duty of the Commission extended beyond that of establishing *rates*. The statute went further and required the Commission to fix fair and reasonable *compensation* to the individual carrier. It had to be the *individual* carrier, for otherwise the term "compensation" is meaningless. Only in the event that they were "just and equitable", could the Commission "fix general rates applicable to all carriers in the same classification." 39 Stat. 412, 430. Rates are not just and equitable that give one carrier a net revenue and impose upon another carrier, in the same class, a deficit." (R. 48)

### **The Defendant's Specification of Error No. 4:**

*"In failing to hold that since the mail traffic bore, in addition to its direct costs, a fair share of the expense of operation and contributed relatively more than the other services for the space furnished, the mail compensation fixed by the Commission was fair and reasonable."*

Since the defendant has by implication admitted by force of its own argument at pages 10, 67 of its brief, that the plaintiff was underpaid, the defendant's argument in support of its specification No. 4 is largely (1) a repetition of its mistaken "theme song" that this is only a matter of legislative rate making, hence that non-compensatory compensation is just and reasonable; and (2) a repetition of its contention that the "reasons" or "circumstances" advanced by the Commission were sufficient to justify its failure to apply the results of its own findings. These concepts already have been sufficiently answered by plaintiff's preceding arguments, to which reference is made to save repetition (pp. 36, 79). Furthermore, in the face of the realities such a line of argument hardly requires any discussion when about 90% of the plaintiff's claim is for furnishing and transporting 15-foot post offices on its trains carrying mail matter and postal clerks at a compensatory rate of 27.17 cents per mile, instead of a non-compensatory rate of 14½ cents per mile.

### **The Defendant's Specification of Error No. 5:**

*"In failing to hold that the statutory requirement that the railroad carry all mail tendered is merely one phase of the general obligation imposed on common carriers to transport all traffic whether tendered by the Government or a private person."*

The defendant's contention seems to be that there is a general obligation imposed on common carriers to transport all traffic whether tendered by the Government or a private person, but it is only elementary law that there is

no such thing as "a general obligation" imposed on common carriers to transport all traffic offered.\* To the contrary, they can be, and many are, quite selective of the kinds of traffic which they will handle.

Perhaps the explanation for this specification 5 is that the defendant was thinking of the rule of law that to the extent to which a common carrier holds itself out to serve the public it must do so for all alike.

### **The Defendant's Specification of Error No. 6:**

*"In failing to hold that the railroad actively sought to retain the mail traffic here involved, and that reasonably similar service could be obtained by the use of other railroads and trucks without increasing costs."*

The defendant makes little attempt to support this specification in its argument, but in any event this point is disposed of sufficiently in Appendix C, pp. 68, 86, to which reference is made to save repetition.

The defendant's argument that "The decision of the Court of Claims is not sustained by traditional judicial standards of 'just compensation'," apparently contends that unless the plaintiff's claim can be measured by a yardstick of *market value* it can recover no compensation even though it is justly entitled to do so.

\*"Every common carrier has the right to determine what particular line of business he will follow, and his obligation to carry is coextensive with, and limited by, his holding out or profession as to the subjects of carriage. If he elects to carry freight only, he will be under no obligation to carry passengers, and vice versa. Similarly, if he holds himself out as a carrier of a particular kind of freight generally, prepared for carriage in a particular way, he will be bound to carry only to the extent and in the manner proposed." (Carriers: 9 Am. Jur. 432).



The plaintiff respectfully submits that the cases cited are not in point because the reach of the Fifth Amendment is not so limited as the defendant's concept thereof.

It is hardly necessary to labor the refutation of the defendant's contention, as the principle is too elementary to justify it. It ought to be enough to quote what this Court said without dissent, speaking through Justice Roberts in *U. S. v. Miller*, as late as January 4, 1943, 317 U. S. 369, 373:

"It is conceivable that an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose. In an effort, however, to find some practical standard, the courts early adopted, and have retained, the concept of market value. The owner has been said to be entitled to the 'value', the 'market value', and the 'fair market value', of what is taken. The term 'fair' hardly adds anything to the phrase 'market value', which denotes what 'it fairly may be believed that a purchaser in fair market conditions have given', or, more concisely, 'market value fairly determined'.

"Where, for any reason, property has no market, resort must be had to other data to ascertain its value; and, even in the ordinary case, assessment of market value involves the use of assumptions, which make it unlikely that the appraisal will reflect true value with nicety."

Other cases to which the opinion made reference were *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 328, 329, 337, 338; and *Albert Hanson Lumber Co. v. United States*, 261 U. S. 581, 589.

## THE PLAINTIFF'S SPECIFICATIONS OF ERROR

### Interest on the Judgment

*Plaintiff's Specification of Error No. 1: In failing to award interest to make just compensation full and complete since the claim was for the compulsory taking of property and services (U. S. v. Griffin, 303 U. S. 226, 82 L. Ed. 764).*

The plaintiff respectfully submits that this Court has already decided that the requisitioning of mail transportation under the Railway Mail Pay Act is a taking for which just compensation is a constitutional right. In construing this Act, this Court said in *U. S. v. New York Central R. Co.*, 279 U. S. 77, 78, 73 L. Ed. 619, that "the Government admits, *as it must*, that a reasonable compensation for such required services is a constitutional right" (Italics Supplied). Again, in *U. S. v. Griffin*, 303 U. S. 226, 238, 82 L. Ed. 764, when this same cause of action between the same parties was before it, this Court reiterated the proposition that railway mail service is compulsory.

The plaintiff further respectfully submits that for a compulsory taking by statutory authority the requirement of the Constitution that "just compensation" shall be paid is comprehensive, and one of the essential elements of just compensation is that of interest when the taking precedes the payment; hence the rule that the United States will not be held liable for interest on unpaid accounts and claims does not apply. This Court said as much in the case of *Seaboard Air Line v. United States*, 261 U. S. 302, 405, 67 L. Ed. 664, 670, viz.:

*"The Constitution safeguards the right and § 10 of the Lever Act directs payment (Italics supplied). The rule above referred to, that, in the absence of agreement to pay or statute allowing it, the United States will not be held liable for interest on unpaid accounts and claims, does not apply here. The requirement that "Just compensation" shall be paid is comprehensive,*

and includes all elements, and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation."

It is true that in the *Seaboard Air Line* case, the property involved was in the form of land, but it was not a case of condemnation. In that instance there, as here, there were statutory provisions for payment, in which nothing was said about interest, and the Court further said:

"Section 10 of the Lever Act authorizes the taking of property for the public use on payment of just compensation. There is no provision in respect of interest. *Just compensation is provided for by the Constitution, and the right to it cannot be taken away by statute.* Its ascertainment is a judicial function. *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 327, 37 L. Ed. 463, 468, 13 Sup. Ct. Rep. 622" (Italics supplied).

More recently in *U. S. v. Goltra*, 312 U. S. 203, 208, 85 L. Ed. 776, 781, this Court explained the principle further when it said:

"In the *Seaboard Air Line R. Co.*, case § 10 of the Lever Act (August 10, 1917) (40 Stat. at 1, 276, 279, chap. 53) authorizing the taking by eminent domain of property for the public use on payment of just compensation was under examination. It contains no specific provision for interest. This Court held that a taking under the authority of § 10 required the just compensation "provided for by the Constitution" and that such compensation is payable "as of the time when the owners were deprived of their property". This case, however, and the others cited in the preceding paragraph, involve the requisitioning or taking of property by eminent domain under authority of legislation. *The distinction between property taken under authorization of Congress and property appropriated without such authority has long been recognized*" (Italics supplied).

The Constitution sets up no rule for discrimination between real property and property of other kinds where

property is taken under authority of a statute; and it has many times been held by the Supreme Court of the United States that where the payment does not accompany the taking, but is postponed to a later date, the property owner is entitled to the award of a reasonable additional sum, as interest or damages, to compensate for the loss of the money, as well as the property, during the period of delayed payment (See *Kieselbark v. Commission*, 317 U. S. 399, 403 405 (1943); *Klamath Indians v. U. S.*, 304 U. S. 119, 123 (1938); *Shoshone Tribe v. U. S.*, 299 U. S. 476, 496 (1937); *Liggett & Myers v. U. S.*, 274 U. S. 215 (1927); and cases cited in those opinions. The defendant's position is that:

(1) Admittedly, if there had been a taking of property in the eminent domain sense, the prohibition against the allowance of interest on claims prior to judgment would not apply. *Jacobs v. United States*, 290 U. S. 13; *Seaboard Air Line v. United States*, 261 U. S. 302.

(2) That the Court of Claims had correctly held that (a) that it was not determining just compensation and denied the claim for interest.

(3) That the Court of Claims was clearly correct in its decision that there was no eminent domain taking; and, it follows, therefore, that the railroad may not recover interest. See, e.g. *United States v. Thayer West Point Hotel Co.*, 329 U. S. 585.

The defendant's position on point (1) involves no controversy. For support of points (2) and (3) the defendant seems to rely wholly upon its mistaken impression that the lower Court decided that "there was no eminent domain taking".

In the first place, the fact that the defendants were apparently under the misconception that the protection of the Fifth Amendment applies only to cases of takings by right of eminent domain.



In the second place, it is respectfully submitted that the lower Court did not decide there was no "eminent domain" taking. On the other hand it held that as a matter of fact and of law that there was a taking for which just compensation was required under the Fifth Amendment, although it did not put its award upon that ground. This is mentioned several times in the decision such as in the following quotation:

"under these, and other *statutory conditions*, the plaintiffs transported mail tendered by the United States. The tender could not be refused except under heavy penalty, and the terms used in the record to describe such a statutory tender, such as 'order' or 'authorization' have essentially one meaning which derives its scope, definition and force from the statutory requirements that compelled obedience. The carrier had no choice in the matter. That which protected the carrier was the provision for 'fair and reasonable compensation', and, of course, the *Fifth Amendment*." (R. 36.)

*Plaintiff's Specification of Error No. 2: In failing to hold that it was determining a claim for just compensation required by the Constitution, whether it was (a) giving effect to an order of the Interstate Commerce Commission as properly construed, or was (b) determining just compensation because the order of the Commission was confiscatory.*

Plaintiff's Specification No. 2 is supplementary to its Specification No. 1. The fact of the taking is not only established by the lower Court's special findings of fact, but in the course of its opinion it seems evident that it was in no doubt but that, as a matter of law, the taking was one for which just compensation was required by the Constitution (R. 36, 37).

The record shows that proof of claim was made both upon (1) statutory grounds and (2) constitutional grounds

(R. 20). The proof made on the theory of compensation on statutory grounds established the amount of the claim at \$186,707.06 (Finding 23, R. 27). That evidence was also relevant to the theory of compensation upon constitutional grounds but was supplemented by an additional study in which the amount resulting was \$179,005.64 (Finding 30, R. 30).

After weighing all the evidence and hearing all the arguments, the lower Court was convinced that the basis on which the Commission made its finding on the result of the cost study was fair and reasonable, as the "studies made are in no wise shown to be out of line with the then state of the art, science, or profession of statistical analyses and cost accounting" (R. 46); and a little further on said:

"More than that, the Commission has by its findings, using its adopted plan and its own methods as applied to plaintiffs' circumstances, proved that plaintiffs have been underpaid \$186,707.06 in fair and reasonable compensation for the period in question" (See Finding 23).

"The reasons given by the Commission for not ordering payment, on the basis of its findings, of the annual sums making up the above total of \$186,707.06, and not convincing or even persuasive. In our opinion they all overlook the statutory mandate, that the compensation to be allowed for carrying the mails must be reasonable, and the *constitutional one* that it must be just" (R. 48).

Nevertheless, the Court evidently felt that the intention of the statute was so clear that, had it been properly carried out, the constitutional requirement for just compensation also would have been met, hence to make an award on the statutory ground would make it unnecessary to do so on constitutional ground.

In other words, the fact that because the Commission's order, properly construed and applied, would have met the statutory requirement does not make any less binding the constitutional duty to pay just compensation; and it is well established that the constitutional requirement guarantees the right of the person whose property is taken, not only to compensation according to the value of the property at the time of taking (see also *U. S. v. Miller*, 317 U. S. 369 (1943)) but also the payment of the compensation with reasonable promptness. The promptness of the payment is included with the right, for the reason that it is an element of the justness of the compensation. This right is not dependent on either the statute or agreement and any condemnation statute not providing for certain and reasonably prompt compensation, or its equivalent, to the owner of the property taken violates the Federal Constitution. See, for example: *Danforth v. U. S.*, 308 U. S. 271, 283-286 (1939); *Atlantic Coast Line R. Co. v. U. S.*, 132 Fed. 2d 959, 962-963 (1943); *U. S. v. 47.21 Acres of Land*, 48 Fed. Supp. 73 (1943); *U. S. v. Indian Creek Marble Co.*, 40 F. Supp. 811, 181-826 (1941).

It must have been with this principle that Justice Holmes quoted from *Parks v. Boston*, 15 Pick. 198, 208, where Chief Justice Shaw said that:

"The true rule of justice for the public would be to pay the compensation with the one hand, whilst they apply the axe with the other."

### **ON THE STATUTE OF LIMITATIONS**

At page 84 of its brief the defendant argues that the statute of limitations bars the major part of this claim. This argument rests upon the theory that the cause of action first accrued at the date of the order of a Division of the Commission on May 10, 1933, and not from the decision of the Commission as a whole on February 4, 1936. The same contention was raised in the Court of Claims and rejected by that Court in the following language:

"There is the question as to the statute of limitations, Section 156 of the Judicial Code, U. S. C., Title 28, § 262. Under that statute, a claim is barred unless the petition is filed within six years after the claim first accrues. The time when the claim can be definitely ascertained and set up governs. *Ylagan v. United States*, 101 C. Cls. 294, 296.

"Since the determination of fair and reasonable compensation was confided by Congress to the Interstate Commerce Commission, the amount of the claim was not ascertainable until the Commission had given its final determination. This date was February 4, 1936; 214 I. C. C. 66. It is true that the Commission reopened its docket No. 9200 under the decree of a district court, which was thereafter held by the Supreme Court to be without jurisdiction over the complaint, but the Commission did in fact reopen the case, considered it on the merits, and did in fact thereupon render its final decision in the matter, affirming its previous holding.

"The six-year statute of limitation therefore began to run February 4, 1936. Since the original petition was filed herein February 2, 1942, the claim is within the statute. That the claim relates back to the filing of the application with the Commission has been held by the Commission, by this Court, and by the Supreme Court, *Railway Mail Pay*, 144 I. C. C. 675, 717, and *New York Central Railroad Co. v. United States*, 65 C. Cls. 115, 124 ff, a decision which antedated that of the Commission, and which was affirmed by the Supreme Court, 279 U. S. 73."

The Government in its brief cites no authority in support of its assertion that plaintiff's cause of action accrued on May 10, 1933, and not when the Commission rendered its decision on February 4, 1936, following a formal reopening by the Commission of the proceeding, and after further hearings at which additional evidence was adduced and the petition reconsidered. There can be no doubt of the general rule that an administrative agency, such as the Interstate Commerce Commission, can reopen a proceeding for reconsideration. No contention is made



that the Interstate Commerce Commission was without such power and authority. Indeed it must do so under some circumstances. See *Alchison, Topeka & Santa Fe Railway Company v. U. S.*, 284 U. S. 248, 76 L. ed. 273.

There appears to be no decision of a court determining when a cause of action accrues against the United States in a mail pay case, whether at the time of the decision by a division, or by Interstate Commerce Commission, in such a proceeding, or at the later time of a decision following a reopening and a reconsideration. There have, however, been numerous cases involving the effect of a reconsideration of a refund claim in tax matters by the Commissioner of Internal Revenue, where the analogy is so close that those decisions would seem to be governing on this question.

The case of *American Safety Razor Corp. v. U. S.*, 6 F. Supp. 293, decided by the Court of Claims on March 5, 1934, involved this very question. A claim for a refund was denied by the Commissioner of Internal Revenue followed by a series of communications with reference to further consideration of the claim. The court determined that the particular claim involved was, in effect, reopened and reconsidered by the Commissioner, followed by its rejection. Suit was filed within two years from the final rejection, but not within two years of the first rejection, and the Government argued that the suit should have been filed within two years of the first rejection.

In support of its contention, the Government pointed to a Treasury Decision stating that no reopening of a claim for refund and no reconsideration of such claim could extend the period within which suit should be brought. The Court of Claims decided that the Treasury Decision was erroneous and that "the effect of reconsideration was to set aside the former decision and bring up the matter as if it had not before been acted upon." In deciding that the statute of limitations ran from the final decision upon reopening of the case and not from the first decision, the

Court cited the decision of the United States Circuit Court of Appeals for the Second Circuit in *McKesson & Robbins v. Edwards*, 57 F. (2d) 147, and other court decisions stating:

"In *Jones v. United States*, 77 Ct. Cl. ...., 5 F. Supp. 146, 152, we said: 'That a reconsideration of a refund claim on the merits constitutes a reopening of the claim is no longer open to doubt.'

"This case also affirms the rule that, \* \* \* when the Commissioner, upon application made by a taxpayer within the time in which suit could be instituted on a disallowed claim, enters into a reconsideration of the merits of the claim and later makes a decision thereon rejecting the claim, or adheres to his former decision rejecting it, his decision for the purpose of the statute of limitations is in abeyance until he has reached and announced his final decision, and the taxpayer, under section 3226 of the Revised Statutes, as amended (26 USCA § 156), has two years thereafter, in which to institute suit."

The Supreme Court of the United States refused to grant certiorari to review this decision, 293 U. S. 599.

The decision of the Court of Claims and the refusal to grant certiorari to review that decision were cited by the United States Circuit Court of Appeals for the Second Circuit in *Watts v. U. S.*, 82 F. (2d) 266, for the rule that a suit brought within two years after the final action in the reconsideration of a decision upon a refund claim was timely. The Court rejected a contention that the statute of limitations ran from the first determination of a claim for refund and held that following a reopening of the case by the Commissioner of Internal Revenue the statute of limitations began to run all over again at the time of the second decision.

There have been numerous other cases which apply the same rule or law, including *Pacific Mills v. Nichols*, 72 F. (2d) 103, decided by the United States Circuit Court of Appeals for the First Circuit, *U. S. ex rel Bolang Worsted*

*Mills v. Helvering*, 89 F. (2d) 848, decided by the United States Court of Appeals for the District of Columbia, *J. E. Irvine & Co. v. U. S.*, 10 F. Supp. 1019, decided by the United States Court of Claims, and others.

In *U. S. ex rel Bolany Worsted Mills v. Helvering*, the rule of law is well stated. After citing the Second Circuit in *Watts v. U. S.*, 82 F. (2d) 266, the Court said:

"In that case Judge Chase said: 'In *McKesson & Robbins v. Edwards*, 57 F. (2d) 147, we had before us the effect upon the time for bringing suit of the action of the commissioner in reopening a refund claim after having rejected it. There, as here, there had been a reconsideration on the merits and not merely a determination as to whether or not to reconsider. We held that while the commissioner was reconsidering the claim was to be treated as sub judice; the limitation of the statute not beginning to run until the decision upon reconsideration.' Other cases to the same effect are *Southwestern Oil & Gas Co. v. U. S.* (D. C.) 29 F. (2d) 404, affirmed (C. C. A.) 34 F. (2d) 446, certiorari denied November 25, 1929, 280 U. S. 601, 50 S. Ct. 82, 74 L. Ed. 646; *Jones v. United States* (Ct. Cl. 1933), 5 F. Supp. 146; *American Safety Razor Corporation v. United States* (Ct. Cl. 1934), 6 F. Supp. 293; *Pierce-Arrow Motor Car Company v. United States* (Ct. Cl. 1935), 9 F. Supp. 577.

"Applying the rule of the cases cited to the instant case, it is clear that the Commissioner's conduct in reconsidering the claim left open the question of the right to refund, until he should 'finally decide' that question. His action was the equivalent of saying, 'As a result of your protest I will consider the question in the light of new facts and in the meantime and until I reach a conclusion my former action will stand for naught.' . . ."

It is, therefore, a well-established rule of law that a reopening and a reconsideration by a Federal administrative agency starts the statute of limitations to run over again. The contention of the Government that, since the Commission's second decision did not differ from the first decision,

the statute of limitations did not start to run anew is fallacious. In every case herein cited the plaintiff's claim for refund was rejected in the first decision of the Commissioner, and such rejection was repeated a second time after reopening. As a matter of fact in the case of *J. E. Ervine & Co. v. U. S.*, 10 F. Supp. 1019, the claim was twice-reopened and three times rejected. The court held that the statute of limitations began to run anew from the third and final rejection.

## CONCLUSION

### *As to the Defendant's Conclusion:*

On mistaken premises the defendant in the conclusion of its brief asserts ten propositions, none of which the plaintiff believes to be sound. To avoid repetition it refers the Court to the pages of this brief wherein each of the said propositions is refuted.

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*As to the Plaintiff's Conclusion:*

The plaintiff's conclusions can be briefly stated thus:

- (1) Except on the question of interest, the decision of the lower Court is entirely consonant with the findings of fact, and the findings of fact are entirely consonant with the evidence, as is evident from the fact that the petitioner has failed to assign a single direct specification of error to any one of the numerous special findings of fact upon which rests the decision of the lower Court.
- (2) The contention, as a proposition of law that the cause of action was one for the review of legislative rate making, hence the lower Court lacked jurisdiction is in direct conflict with the decisions of this Court in *U. S. v. New York Central*, 279 U. S. 76, and *U. S. v. Griffin*, 303 U. S. 226; and is in contradiction of its own previous position, and is contrary to the principle of res judicata, since the point was expressly settled in the latter case between the same parties on the same cause of action.
- (3) Since this a taking of property within the particular or the Fifth Amendment by statutory authority the plaintiff is entitled to have interest added to the award.

WHEREFORE, the plaintiff respectfully prays that in respect to the award of the principal sum of \$186,707.06 the

judgment of the lower Court be affirmed, but that the cause be remanded to the lower Court with a direction to add interest in order to make its compensation full and complete.

Respectfully submitted,

MOULTRIE HITT,

*Attorney for Alfred W. Jones,  
Receiver, and William T. Griffin  
and Hugh William Purvis, Re-  
ceivers, for Georgia & Florida  
Railroad Company,*

601 Tower Building  
Washington 5, D. C.

Dated Washington, D. C.  
February 2, 1949.

## APPENDIX A.

### RAILWAY MAIL PAY ACT OF JULY 28, 1916

Sec. 5. That the Postmaster General is authorized and directed to readjust the compensation to be paid to railroad companies from and after the thirtieth day of June, nineteen hundred and sixteen, or as soon thereafter as may be practicable, for the transportation and handling of the mails and furnishing facilities and services in connection therewith upon the conditions and at the rates hereinafter provided. (28 U. S. C. 524)

The Postmaster General may state railroad mail routes and authorize mail service thereon of the following four classes, namely: Full railway post-office-car service, apartment railway post-office car service, storage-car service, and closed-pouch service. (28 U. S. C. 525)

Full railway post-office car mail service shall be service by cars forty feet or more in length, constructed, fitted up, and maintained for the distribution of mails on trains. The authorization of full railway post-office cars shall be for standard-size cars sixty feet in length, inside measurement, except as hereinafter provided. (28 U. S. C. 526)

Apartment railway post-office car mail service, shall be service by apartments less than forty feet in length in cars constructed, fitted up, and maintained for the distribution of mails on trains. Two standard sizes of apartment railway post-office cars may be authorized and paid for, namely, apartments fifteen feet and thirty feet in length, inside measurement, except as hereinafter provided. (28 U. S. C. 527)

. . . . .

Service by full and apartment railway post-office cars and storage cars shall include the carriage therein of all mail matter, equipment, and supplies for the mail service and the employees of the Postal Service or Post Office Department, as shall be directed by the Postmaster General to be so carried. (28 U. S. C. 529)

Closed-pouch mail service shall be the transportation and handling by railroad employees of mails on trains on which full or apartment railway post-office cars are not authorized, except as hereinbefore provided. The authorizations for closed-pouch service shall be for units of seven

feet and three feet in length, both sides of car. (28 U. S. C. 530)

Where authorizations are made for cars of the standard lengths of sixty, thirty, and fifteen feet, as provided by this section, and the railroad company is unable to furnish such cars of the length authorized, but furnishes cars of lesser length than those authorized, but which are determined by the department to be sufficient for the service, the Postmaster General may accept the same and pay only for the actual space furnished and used, the compensation to be not exceeding pro rata of that provided by this section for the standard length so authorized: *Provided*, That the Postmaster General may accept cars and apartments of greater length than those of the standard requested, but no compensation shall be allowed for such excess lengths. (28 U. S. C. 532)

In computing the car miles of the full railway post-office cars and apartment railway post-office cars, the maximum space authorized in either direction of a roundtrip car run shall be regarded as the space to be computed in both directions, unless otherwise mutually agreed upon. (28 U. S. C. 534)

The Postmaster General is authorized to make special contracts with the railroad companies for the transportation of the mails where in his judgment the conditions warrant the application of higher rates than those herein specified, and make report to Congress of all cases where such special contracts are made and the terms and reasons therefor. (28 U. S. C. 565)

All cars or parts of cars used for the Railway Mail Service shall be of such construction, style, length, and character, and furnished in such manner as shall be required by the Postmaster General, and shall be constructed, fitted up, maintained, heated, lighted, and cleaned by and at the expense of the railroad companies. No pay shall be allowed for service by any railway post-office car which is not sound in material and construction and which is not equipped with sanitary drinking water containers and toilet facilities, nor unless such car is regularly and thoroughly cleaned. (28 U. S. C. 537)



Railroad companies carrying the mails shall furnish all necessary facilities for caring for and handling them while in their custody. They shall furnish all cars or parts of cars used in the transportation and distribution of the mails, except as herein otherwise provided, and place them in stations before the departure of trains at such times and when required to do so. They shall provide station space and rooms for handling, storing, and transfer of mails in transit, including the separation thereof, by packages for connecting lines, and such distribution of registered mail in transit as may be necessary, and for offices for the employees of the Railway Mail Service engaged in such station work when required by the Postmaster General, in which mail from station boxes may be distributed if it does not require additional space.

If any railroad company carrying the mails shall fail or refuse to provide cars or apartments in cars for distribution purposes when required by the Postmaster General, or shall fail or refuse to construct, fit up, maintain, heat, light, and clean such cars and provide such appliances for use in case of accident as may be required by the Postmaster General, it shall be fined such reasonable sum as may, in the discretion of the Postmaster General, be deemed proper. (28 U. S. C. 538)

The Postmaster General shall in all cases decide upon what trains and in what manner the mails shall be conveyed. Every railroad company carrying the mails shall carry on any train it operates, and with due speed, all available matter, equipment, and supplies directed to be carried thereon. If any such railroad company shall fail or refuse to transport the mails, equipment, and supplies when required by the Postmaster General on any train or trains it operates, such company shall be fined such reasonable amount as may, in the discretion of the Postmaster General, be deemed proper. (28 U. S. C. 539)

All railway common carriers are hereby required to transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith. (28 U. S. C. 541)

The Interstate Commerce Commission is hereby empowered and directed as soon as practicable to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of such mail matter by railway common carriers and the service connected therewith, prescribing the method or methods by weight, or space, or both, or otherwise, for ascertaining such rate or compensation, and to publish the same; and orders so made and published shall continue in force until changed by the commission after due notice and hearing. (28 U. S. C. 542)

The procedure for the ascertainment of said rates and compensation shall be as follows.

Within three months from and after the approval of this act, or as soon thereafter as may be practicable, the Postmaster General shall file with the commission a statement showing the transportation required of all railway common carriers, including the number, equipment, size, and construction of the cars necessary for the transaction of the business; the character and speed of the trains which are to carry the various kinds of mails; the service, both terminal and en route, which the carriers are to render; and all other information which may be material to the inquiry, but such other information may be filed at any time in the discretion of the commission. (28 U. S. C. 545)

All the provisions of the law for taking testimony, securing evidence, penalties, and procedure are hereby made applicable. (28 U. S. C. 548)

For the purpose of determining and fixing rates or compensation hereunder the commission is authorized to make such classification of carriers as may be just and reasonable and, where just and equitable, fix general rates applicable to all carriers in the same classification. (28 U. S. C. 549)

Pending such hearings and the final determination of the question, if the Interstate Commerce Commission shall determine that it is necessary or advisable, in order to carry out the provisions of this section, to have additional and more frequent weighing of the mails for statistical purposes, the Postmaster General, upon request of the commis-

shall provide therefor in the manner now prescribed by law, but such weighing need not be for more than thirty days. (28 U. S. C. 550)

At the conclusion of the hearing the Commission shall establish by order a fair, reasonable rate or compensation to be received, at such stated times as may be named in the order, for the transportation of mail matter and the service connected therewith and during the continuance of the order the Postmaster General shall pay the carrier from the appropriation herein made such rate or compensation. (28 U. S. C. 551)

*Either The Postmaster General or any such carrier may at any time after the lapse of six months from the entry of the order assailed apply for a re-examination, and thereupon substantially similar proceedings shall be had with respect to the rate or rates for service covered by said application, provided said carrier or carriers have an interest therein.* (28 U. S. C. 553) (Italics supplied)

For the purposes of this section the Interstate Commerce Commission is hereby vested with all the powers which it is now authorized by law to exercise in the investigation and ascertainment of the justness and reasonableness of freight, passenger, and express rates to be paid by private shippers. (28 U. S. C. 554)

That it shall be unlawful for any railroad company to refuse to perform mail service at the rates or methods of compensation provided by law when required by the Postmaster General so to do, and for such offense shall be fined \$1,000. Each day of refusal shall constitute a separate offense. (28 U. S. C. 563)

## APPENDIX B.

### OPINIONS AND DECREES OF THE THREE JUDGE UNITED STATES DISTRICT COURT FOR THE AUGUSTA DIVISION OF THE SOUTHERN DISTRICT OF GEORGIA

(Copied from Plaintiffs' Exhibit 1, the said Exhibit being the transcript of record, Supreme Court of the United States, October Term, 1937 No. 63, the United States of America and Interstate Commerce Commission vs. W. V. Griffin and H. W. Purvis, Receivers for Georgia & Florida Railroad, Appeal from the District Court of the United States for the Southern District of Georgia.)

OPINION AND DECREE—Filed January 23, 1935 (Trans. in No. 63 (1937) R. 29)

— IN UNITED STATES DISTRICT COURT

In Equity, No. 207

W. V. GRIFFIN and H. W. PURVIS, Receivers for Georgia & Florida Railroad, Petitioners

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

OPINION AND DECREE—Filed January 23, 1935

This is a suit by W. V. Griffin and H. W. Purvis, Receivers of the Georgia & Florida Railroad, against the United States of America and the Interstate Commerce Commission to enjoin, set aside, amend, and suspend an order of such Commission of May 10, 1933, denying an application for increased compensation for the transportation of mail. The suit is brought under U. S. C. A. Title 28, Sections 41 (27 and 28) and 43-48.

No other facts were established or sought to be established than those set forth in such order of said Commission, a copy of which is annexed to petitioners' complaint, and it is therefore considered unnecessary and redundant to restate "Findings of Fact" as provided by Equity Rule 70½. The challenge is to the conclusion drawn from undisputed facts.

The facts developed in the "cost study" fully set forth in such order of the Commission were ascertained by the



application of rules prescribed by the Commission. All parties to this controversy agree that a "cost study" is not and cannot be mathematically correct but is an approximation. Such "cost study" discloses among other facts that "There was (1) a deficit in net railway operating income from mail of \$4,945.00 based upon 1905 operations". It further disclosed that as regards revenue: "The distribution of expense upon the space ratios shows that the ratio for mail service was 102.79" or that for every dollar applicants received for transporting mails they expended one dollar and 2.79 cents.

*The fact that this railroad lost more money on other services rendered by it or that other railroads transported mail under similar, if not identical conditions, at a profit or that this railroad belonged in a certain classification established by such Commission, known as Class 1 railroads and that therefore it should be in accord with other railroads of such Class as to compensation as to mail, do not refute or impair the fact that the compensation allowed this railroad for the transportation of mail does not equal the cost of so doing. (Italics supplied)*

While it is true that "For the purpose of determining and fixing rates or compensation hereunder the Commission is authorized to make such classification of carriers as may be just and reasonable and \* \* \* fix general rates applicable to all carriers in the same classification", it can fix such rates only "Where just and equitable". 39 U. S. C. A., Section 549.

The transportation of mail by railroads is compulsory but they are "entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith." 39 U. S. C. A., Section 541.

There is no attack upon the efficiency of the operation of this railroad. There is no charge of extravagance. The bald fact remains that this railroad is required in order to escape severe punishment (39 U. S. C. A., Section 563) to transport mail at a compensation fixed by such Commission and that such compensation does not pay the actual cost of service. *This compensation is not in compliance with the duty on the United States to pay "fair and reasonable compensation" and is not "just and equitable". (Italics supplied)*

It is therefore ordered and decreed:

(1) That said order of the Interstate Commerce Commission of May 10, 1933, is and has at all times been unlawful and that said order be set aside and annulled.

(2) Said Commission shall take such further action in the premises as the law requires in view of the annulment and setting aside of the said order of May 10, 1933.

Inasmuch as this court has not the authority to fix the compensation we do not deal with the question of what per cent of return on the investment, if any, would be required to make the compensation fair and reasonable.

This 18th day of January, 1935.

SAMUEL H. SIBLEY,  
*United States Circuit Judge.*

WM. H. BARRETT,  
*United States District Judge.*

E. MARVIN UNDERWOOD,  
*United States District Judge.*

[File endorsement omitted.]

OPINION AND DECREE—Filed February 23, 1937 (Trans. in No. 63 (1937) R. 55)

IN UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF GEORGIA, AUGUSTA  
DIVISION

In Equity, No. 228

W. V. GRIFFIN and H. W. PURVIS, Receivers for Georgia &  
Florida Railroad

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE  
COMMISSION

OPINION AND DECREE—Filed February 23, 1937

Effective August 1, 1928, the Interstate Commerce Commission (hereinafter called Commission), in Railway Mail Pay, 144 I. C. C. 675, established rates for transportation of mail by railroads over 100 miles in length and these rates were applied to the Georgia & Florida Railroad. There

after the receivers of such railroad made application to the Commission for an alteration of such rates so that they would be fair and reasonable for such railroad. After a test period, investigation and hearing from counsel for applicant and for the Postmaster General the Commission on May 10, 1933, declined to change the rates.

The receivers of such railroad then brought their petition before a Three-Judge Court against the United States of America and against said Commission, praying that said order of May 10, 1933, be declared unlawful and wholly void and that such Commission reopen and reconsider the proceedings and "determine the fair and reasonable rates to be received by petitioners for transportation of the mails, on and after said April 1, 1931".

"No other facts were established or sought to be established than those set forth in said order of said Commission, a copy of which is annexed to petitioners' complaint". "The challenge is to the conclusion drawn from the undisputed facts." (Previous decision of this court.) The court therefore deemed it unnecessary to state "Findings of Fact"; but its judgment did declare certain facts as follows:

"(1) The facts developed in the 'cost study' fully set forth in such order of the Commission were ascertained by the application of rules prescribed by the Commission.

"(2) All parties to this controversy agree that a 'cost study' is not and cannot be mathematically correct but is an approximation.

"(3) 'The distribution of expense upon the space ratios shows that the ratio for mail service was 102.79' or that for every dollar applicants received for transporting mails they expended one dollar and 2.79 cents.

"(4) *The fact that this railroad lost more money on other services rendered by it or that other railroads transported mail under similar, if not identical, conditions at a profit or that this railroad belonged in a certain classification established by such Commission, known as Class 1 railroads, and that therefore it should be in accord with other railroads of such class as to compensation as to mail, do not refute or impair the fact that the compensation allowed this railroad for the transportation of mail does*

*not equal the cost of so doing. The Commission can fix such rates only where just and equitable.* (Italics supplied)

"(5) The transportation of mail by railroads is compulsory but they are entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith."

"(6) There is no attack upon the efficiency of the operation of this railroad. There is no charge of extravagance."

The said order was annulled and the Commission was directed to take such further action as the law requires. There was no appeal from this decision.

Thereafter the Commission of its own motion reopened such proceeding, which resulted in a report on February 4, 1936, again establishing the same rates which this court had declared unlawful.

It becomes important to ascertain what, if any, additional testimony, or what, if any, different rules of law warranted such conclusion.

For the reason that neither report states definitely "Findings of Fact" as such it is not easy to ascertain what different facts existed at the different hearings. We will do our best to ascertain the differences in facts and in rules of law following the course of discussion in the last report.

The report, after quoting from brief of applicant, states: "There is implicit in the statement quoted, and in the corresponding portion of the opinion referred to, the assumption that if the department discontinues mail service on applicant's trains the applicant will thereby be saved the expenditures of \$1.0279 for every dollar of revenue it thus loses."

We do not concur in this statement. The opinion definitely states that these figures were derived by "the distribution of expense upon the space ratios" and by the employment of methods approved or directed by the Commission. However, we deem this difference in interpretation immaterial.

*The argument of the Commission to destroy the effect of its methods previously used is thus stated:* (Italics supplied)

"\* \* \* Relative costs derived from a series of studies of expenditures for operations common to a number of



services cannot be converted into absolute costs by using a single figure relation derived from such studies.

The cost computed in the manner described is a hypothetical cost and not an actual cost, and is not necessarily conclusive as applicant contends. In other mail-pay proceedings, in which space authorized and paid for was found to be the space that should be charged to mail in cost studies similar to that here, consideration was given to other factors as well, such as the amount and character of the unused space reported as operated (Railway Mail Pay, 85 I. C. C. 157, 170; 123 I. C. C. 33, 39); the actual space occupied by mail, as distinguished from authorized space, determined by the mail load carried, based upon a count of bags and of packages outside of bags, and, in some instances, by the weight (Railway Mail Pay, 95, I. C. C. 493, 500, 511; 120 I. C. C. 439, 446); comparisons with compensation received from other services in passenger-train cars (Railway Mail Pay, 144 I. C. C. 675, 706); comparisons with freight rates (Railway Mail Pay, 144 I. C. C. 675, 705; 151 I. C. C. 734, 742); comparisons per car-mile and per car-foot miles of the computed cost of mail service and the revenue from authorized mail service with the computed cost of corresponding units in passenger-train service as a whole (Railway Mail Pay, 144, I. C. C. 675, 699); and the character of the service performed in connection with transporting the mail (Railway Mail Pay, 56 I. C. C. 1, 8; Electric Railway Mail Pay, 58 I. C. C. 455, 464; 98 I. C. C. 737, 755)."

*Neither applicant nor this Court entertains the view that the hypothetical cost is "necessarily conclusive". It is merely the fairest method that has been devised. If "actual cost" as to each item be required applicants would be helpless and the Commission would be reduced to guessing. What elements may have been considered here, and should not be in the absence of supporting testimony and some indication as to what weight was given each element. Furthermore, there is no testimony here as to "unused space reported as operated." There is included payment for unused space not operated, of which more later. There is nothing to justify disregard of the fact used in the first report that "space authorized for mail is regarded as space used." (Italics supplied)*

The law as established in this case by the previous decision, unreversed, makes inapplicable "comparisons with compensation received from other services in passenger train cars"; "Comparisons with freight rates"; and "comparisons per car-mile and per car-foot mile of the computed cost of mail service and the revenue from authorized mail service with the computed cost of corresponding units in passenger-train service as a whole."

There is no criticism of "the character of the service performed in connection with transporting the mail."

Further argument of the Commission, as we understand it, is that because 30 feet instead of 15 feet is partitioned off for mail this adds 15 feet to the unused space for which the post office department pays a part. We do not so understand the testimony. Our understanding is that the unused space is the same wherever the partition be placed.

There is however this further finding of fact implied, though not definitely stated, viz: that an unnecessarily large car is used and this adds to the portion paid by the mail for unused space and that if 15 feet were eliminated from the car the mail-space ratio would be reduced to 10.79 per cent, resulting in a profit to applicant from mail of \$1,711.

*Lengthily are theories and possibilities advanced to establish that a different result might be reached if different methods were employed "to ascertain and compute the proportions of operating expense and the separations into expenses for freight service and passenger service respectively", but there is no justification submitted for abandoning the method employed in making the first report, which was unchallenged as to accuracy and was admitted to have been apportioned "in accordance with the formulas prescribed for Class 1 roads for the separation of expenses between freight and passenger service." (Italics supplied)*

The second report not only does not contradict this but reaffirms it in this language: "The methods are the same as those prescribed in our rules governing separation of such expenses on large steam railroads."

We find nothing that warrants any change in our conclusions as to the legality of the order now before us from our previous conclusion as to the same rates except the fact, stated by implication, that the use of a mixed car shorter by 15 feet would result in a profit from mail reve-

me of \$1,711 annually. The report discloses "The total mail service investment thus derived was \$457,082." This return is approximately .0037 per cent. This is not "fair and reasonable."

Inasmuch as all the facts constituting the basis for the order of the Commission are fully set out in the report, it is deemed unnecessary to restate them in this opinion as findings of fact, it is therefore ordered and decreed:

(1) That said order of the Interstate Commerce Commission of February 4, 1936, is and has at all times been unlawful and that said order be set aside and annulled.

(2) Said Commission shall take such further action in the premises as the law requires in view of the annulment and setting aside of the said order of February 4, 1936. This 22nd day of February, 1937.

SAMUEL H. SIBLEY,  
*United States Circuit Judge.*  
 WM. H. BARRETT,  
*United States District Judge.*  
 E. MARVIN UNDERWOOD,  
*United States District Judge.*

[File endorsement omitted.]

## APPENDIX C.

**ARGUMENT IN REFUTATION OF MANY OF THE DEFENDANT'S MISCONCEPTIONS IN ITS REPRESENTATION OF THE FACTS IN THE CASE.**

Since it had its days in the trial-court, and failed to challenge any of that Court's special findings of fact, it hardly seems proper that the defendant should now portray *matters of fact* inconsistently with the findings of the lower Court; or that this Court should be called upon to consider irrelevancies, and ex parte versions of fact as though they were important in connection with specifications of error *on the law*.

In any event, in the interest of fair play, the plaintiff respectfully submits the following refutations to the defendant's representations as to what were "the circumstances in the present case", and "the facts as found by the Interstate Commerce Commission". One of the most striking examples of the tactic to which the plaintiff objects has already been described at page , supra. Other instances are: On page 5 the defendant states, as though it was significant, that the orders given to the plaintiff as of August 1, 1928, for service at rates prescribed by the Commission in its decision of July 10, 1928, *were accepted without protest until April 1, 1931* when they applied to the Commission for a re-examination.

Since the claim here involved begins from and after April 1, 1931, it is obviously immaterial whether or not there was any protest prior to that time. However, the fact is that the plaintiff did, before April 1, 1931 make a serious effort to obtain just compensation, but was defeated then by the policy of the Post Office Department and the Commission of arbitrarily grouping the respondent with lines of more than 100 miles in length, as a class. Finding 13 refers to the defeat of that effort as follows:

"A group of associated short lines presented separate data relating to the short lines represented by



the group. It represented also the Georgia & Florida Railroad, whose total mileage exceeded 100 miles and which was a Class 1 railroad by virtue of its operating revenues. The Commission made no special provision for the Georgia & Florida Railroad in its findings, and did not classify it among the short line railroads. In the application of the order, the Post Office Department included plaintiffs' railroad in the increase of 15 per cent." (R. 21).

The significance of the date of April 1, 1931 is merely that it was the date when respondent (after waiting to a time when no other mail pay case was pending) filed its own entirely separate application for re-examination, in the hope that it would thereby force the Commission to a separate determination of just compensation on its own individual merits and, as was expressly provided for in the Railway Mail Pay Act (28 U. S. C. 553).

Also, on page 5 the defendant injects the bare statement without anything more to support it, or to explain its significance, if any, "that there is no showing that the railroad ever applied to the Post Office Department for contract rates higher than those prescribed by the Commission". However, in its petition for writ the defendant included as one of the questions presented, the contention that the plaintiff had failed to exhaust its administrative remedies by not requesting the Postmaster General for a special contract, hence the following should be said.

In its answer in opposition to the defendant's petition for writ, the plaintiff pointed out that whether or not the plaintiffs did or did not ask the Postmaster General for a special contract is not a matter of definite record (R. 134); the only witness who referred to the possibility of such a special contract was General Superintendent Hardy, who did not take that office until May 1, 1939 (R. 129); and the most he could say was that *so far as he knew* the plaintiffs

had never applied to the Postmaster General for a special contract, but that he did not know that the plaintiffs had never done so (R. 101). Furthermore, the witness could point to only a very limited number of instances where such contracts had been made and then only under special circumstances not existing in this instance (R. 101, 135). Furthermore, that it was, and is, a matter of common knowledge that it was the policy of the Post Office Department to narrowly restrict special contracts to only a very few instances where a carrier traversed a difficult mountain terrain, such as the Rocky Mountains and the Ozark Mountains in Arkansas and Missouri; and in Alaska, and under the Hudson River through tunnels (R. 155). In any event, the authority to the Post Office Department to make special contracts was made to rest wholly in the discretion of the Post Office Department, and laid no correlative duty upon and created and raised no enforceable right for a carrier.

Furthermore the authority for the Postmaster General to enter into a special contract necessarily speaks for the future, and not for the past, hence a special contract could not be a remedy for any of the period prior to the decision of the Supreme Court on Feb. 28, 1938; and, also, even if the authority given by the law to the Postmaster General to make special contracts could possibly be construed as giving a carrier an enforceable remedy, there is no rule which requires a carrier to seek that remedy when it has elected to pursue the particular remedy more expressly provided by the law. Certainly, there is no claim that the Postmaster General, well knowing that the carrier was justly seeking, and in need of, the relief sought, ever made any offer of a special contract.

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On page 7 the defendant represents that "The railroad's claim to higher rates was based entirely on the results obtained by application of this formula".

That statement is not correct. There was other evidence of a corroborating nature, but it is true to say that both the Post Office Department and the plaintiff placed their factual reliance upon the results of an agreed upon joint cost study. That cost study was made in the usual and customary manner, upon principles approved by the Commission; and the fact that that cost study showed, and the Commission found, that an increase of 87.4% was thereby indicated to be needed, is not disputed. The plaintiff does rely in large part upon that evidence, and the result thereof as found by the Commission.

On page 8 the defendant refers to the 3-foot closed pouch service as permitting the transportation of 50 to 56 pouches, but that the number actually carried was less than 50. That is not a candid statement because, in the first place, minimum space units are not ordered upon any theory of maximum use thereof. A three-foot closed pouch unit is simply the smallest unit of space which can be authorized when any transportation service, at all is requisitioned. That minimum was set by the Commission with full appreciation of the fact that in few, if any, instances would the actual service ever be exactly equal to the maximum capacity limit—beyond which the Post Office Department would have to make an authorization for a larger unit of space. Nor is that condition peculiar to minimum 3-foot units. Pay for a 7-foot unit is required whenever the 3-foot maximum of 56 sacks or the equivalent is exceeded, although the excess might not be more than 5 sacks, and so on up the scale. (Finding 21, R. 27).

In the second place, though the minimum unit is for a *theoretical* three linear feet of car space, much more than three linear feet of floor space is *actually* required by the nature of the service. In other words, in theory as many as 56 sacks and packages, *if racked up and piled six feet*

high, could be crammed into three linear feet, but that *theory* does not square with the actualities, viz., a 3-foot closed pouch requisition requires plaintiff's train employees to take on and put off mail sacks and packages at the beginning and at the end of each trip, and at every intermediate post office station; and to care for the same in transit. Because of the necessity for this constant handling of sacks and packages in and out of cars enroute, the mail cannot be stacked vertically to the *theoretical* height of six feet. For prompt handling it must *actually* be spread out over a much greater area of floor space. That fact largely explains why the Post Office Department has always preferred to use the space authorized as being equivalent to the space used.

In the third place, the proportion of 2-foot closed pouch service to R.P.O. service is small, representing in revenue from mail service only 11.08% of the service. That fact, together with the desire for simplification of the cost studies also explains why this plaintiff, and carriers generally, have been willing to consider the space authorized as being equivalent to the space used.

Obviously therefore, to the extent that the use of space authorized as the space used may represent any element of doubt, that doubt is one which inures to the advantage of the Government, and cannot fairly be inverted as a factor or circumstance to discount the result of the cost study.

On page 9 the defendant represents that "in these compilations, space authorized for mail service was treated as space used although not actually used, whereas baggage and express were charged only with space actually used".

This is another statement of the same nature as the one referred to herein immediately preceding, and is mistaken for the same reason. Suffice it to point out that the practice of counting the space "authorized" or requisitioned by the Post Office Department as being equivalent to the



amount of space used, would certainly not have been agreed to by the Post Office Department and approved by the Commission for the cost studies in all previous cases, had it been either unreasonable or unfair to the government. Why it is fair and reasonable to the government in respect to 3-foot closed pouch service has already been explained. In respect to space taken for travelling post office that the space must be restricted to the exclusive use of the post office, hence shut off from the rest of the car by partitions. In that space the government can to the limit of its cubic capacity transport as much or as little mail matter as the Post Office Department itself may choose. Consequently it is in fact space devoted to that use exclusively, even though the volume carried while in such exclusive use is, at times, less than the volume which could be therein carried within its maximum cubical capacity.

The defendant represents on page 9 that the Commission held that the cost study was not considered to be an accurate ascertainment of the actual cost of the service, but only an approximation to be given appropriate weight considering all the circumstances, and adverted to various other factors which it deemed were controlling. However that was, it is respectfully submitted, merely an unsupported generalization which cannot suffice to make lawful and proper capricious and arbitrary decisions.

Terming the cost study in the present case an "approximation" does not seem to have been expressed in just that way in other cases, for the language in previous decisions has been that "the cost study furnished a sufficiently reliable basis" or a "substantial basis", for conclusions as to the reasonableness of mail pay rates.

The three terms are not greatly different, however, and the word "approximate" has been defined by the courts. In *Ross v. Keaton Tire, Etc., Co.* (1922) 57 Cal. App. 50, in which there was involved a promise to pay rent at the

rate of 8 per cent on cost of a building to be erected and to cost approximately \$21,000.00; the Court held that the actual cost of \$31,857.00 was not approximately \$21,000.00. The Court said "The word 'approximate' is defined 'to come close to' as in quality, degree, or quantity; approach closely without coinciding with exactly; or reaching the specified amount or quantity. (*Bloomington Canning Co. v. Union Can Co.*, 94 Ill. App. 62)."

In *City of Richmond v. L. J. Smith & Co.*, 89 S. E. 1923, 119 Va. 198, involving the excavation of bridge foundations to bed rock, the depth of which was given as "approximate", the Court said, "when therefore, the line of bed rock was given as 'approximate', it was intended to express the idea that the line as shown upon the profile was nearly, but not exactly, correct. See Webster's International Dic."

In *Worcester Post Co. v. W. H. Parsons Co.*, 265 Fed. 591, it was held that a contract for sale and delivery of "approximately" 45 tons per month did not permit of any substantial variation or departure from that number without consent.

The District Court had before it that explanation given by Division 5, as well as that of the Commission in its decision of Feb. 4, 1936, and, after listening to oral argument, stated its opinion as follows:

"Neither applicant nor this Court entertains the view that the hypothetical cost is 'necessarily conclusive'. It is merely the fairest method that has been devised. If 'actual cost' as to each item be required, applicants would be helpless and the Commission would be reduced to guessing." (Appendix . . . ),

To similar effect the Court of Claims stated:

"The trouble with this argument is that a deficit in net railway operating income from mail is always necessarily 'Computed'. Actual loss or actual deficit in such income is an ignis fatuus." (R. 42)

"We thus see that ascertainment of 'actual' as applied to plaintiffs' cost in the transportation of the mail, had no prospect of realization. The cost had to be a 'computed' cost in any event." (R. 43)

"Here, however, it is found that 'there is no evidence which indicates that plaintiffs' operating costs were excessive in relation to the character of the road and the traffic area or that such costs were increased by inefficiency, negligence, or uneconomical management of operation by the plaintiffs'."

"Nowhere in the Commission's findings or conclusions in plaintiffs' case do we find an intimation that the so-called 'actual cost', whatever it might be, was anything but fair and reasonable." (R. 43)

"We are of the opinion that the 'approximation' should be given greater weight than the Commission affords it, because, as we have said, and the Commission in effect admits, there is no such thing as certainty in actual cost. Approximate, or as it is called, 'computed' cost must be relied upon, and as a matter of law must be decisive. There is no alternative, at least no satisfying alternative." (R. 47)

In any event, there was no practical necessity to establish the exact cost with precise mathematical exactitude. In *Baltimore & Ohio et al. v. United States*, decided May 18, 1926 (298 U.S. 351), a case involving the divisions of joint rates under an order of the Commission, where the issue of confiscation was raised, the Supreme Court of the United States said:

"The burden of appellants, heavy though it is, does not require them to prove with arithmetical accuracy the cost of the transportation covered by the challenged divisions or the value of the property used to perform it, or the proportion attributable to that service. It is enough if the evidence preponderating in their favor reasonably warrants findings sufficient to support the decree sought. Many issues as to which demonstrable accuracy is impossible have to be decided by the courts. In ascertaining cost of transportation of one out of many commodities hauled by railroads, it is impossible to attain precision. Mere lack of it is not ground for

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objection, either to the evidence offered of the facts which it tends to prove."

On page 10 the defendant cites as other "factors" to justify the Commission's disregard of the result of the cost study, that "the Commission found that (1) mail with relation to the other services is bearing its fair share of the expenses of operation and is contributing relatively more than the other services for the space furnished"; that (2) mail revenues have been relatively more stable than from other passenger train services"; and that (3) the actual use of the closed pouch mail units was considerably below their maximum capacity. Therefore, the defendant argues, the Commission concluded in its first report, for those reasons, and the further fact that the applicant receives the same rates as those received by other roads for the units of service, many of them being in much the same situation as the applicant in respect of passenger-train operations, "the data submitted fail to justify giving the applicant rates higher than those now paid other railway common carriers for like service".

First it is to be observed that here, as elsewhere, the defendant goes back to statements made by the Commission in an effort to exculpate itself, without paying any respect to the special findings of fact by the lower Court on the same evidence that was before the Commission, together with all these same "reasons" put forward by the Commission.

(1) In any event the plaintiff respectfully submits that the lack of merit in these "factors" as justification for disregard of the cost study, is manifest in the fact that the very object of the cost study, upon principles which the Commission had always approved theretofore, was to separate the passenger and freight services; and then to segregate the respective passenger services into separate and distinct "compartments", so that there could be no confusion of thought to becloud the question as to what rate



In many respects the mail service required differs from that connected with any other. For example, the service must be furnished on demand and must be given preference over any other service performed by railroad passenger trains; and extraordinary care and attention must be given to speed and connections with other trains under penalty of a fine for failure to deliver. These distinguishing features and others that might be mentioned indicate that in some respects the conditions of service are more exacting and burdensome than conditions with respect to other services in passenger trains. \* \* \* " (Railway Mail Pay, 56 I.C.C. 1, 46).

(3) The point that 3-foot closed pouch were used to something less than the possible maximum has already been dealt with herein preceding at page 71, and as there shown has no merit. After considering the same contentions the lower Court, on the evidence as a whole, said:

"The Commission has by its findings, using its adopted plan, and its own methods as applied to plaintiffs' circumstances, proved that plaintiffs have been underpaid \$186,707.06, in fair and reasonable compensation for the period in question. (See Finding 23).

That those "factors", like others, were, obviously, mere talk, thrown in to give some appearance of plausibility to the fact that the Commission's action was purely arbitrary is manifest in the fact that the Post Office Department freely admitted the plaintiff was underpaid; that the defendant now concedes as much in its brief; and the special findings of fact by the Court of Claims were unchallenged. Plaintiff respectfully submits that the fact the Commission applied a procrustean rule desired by the Post Office Department for which it also had an administrative predilection in disregard of the evidence is not excused by reasons which after two courts had found too lame. Yet they are again urged by the defendant. Plainly the Commission should have given effect to a cost study which "took into account

all the considerations that might fairly be brought forward and reasonably be given consideration (*Olson v. United States*, 292 U.S. 246, 257); and which, in the opinion of a three judge District Court was "the fairest method that has been devised." (Appendix B, p. 65).

At page 10 the defendant clearly reveals the real reason for the Commission's disregard of the result of the cost study, in favor of a rule of administrative convenience desired by the Post Office Department when it says:

"\* \* \* and in view of the fact that the applicant receives the same rates as those received by other roads for the same kind of service, many of these other roads being in much the same situation as the applicant in respect of passenger-train operations, 'the data submitted fail to justify giving the applicant rates higher than those now paid other railway common carriers for like service.'"

In the first place, all that this Commission's "reason" meant was that there are other lines with which this plaintiff has been arbitrarily classed which are paid the same rates per mile per unit, and as they are suffering likewise, the plaintiff will have to continue to do so.

Respecting this proposition the lower Court said:

"The duty of the Commission extended beyond that of establishing rates. The statute went further and required the Commission to fix fair and reasonable compensation to the individual carrier. It had to be the individual carrier, for otherwise the term 'compensation' is meaningless \* \* \*. Rates are not just and equitable that give one carrier a net revenue and impose upon another carrier, in the same class, a deficit. The rates authorized by the Commission were based on a grouping together and then given particular application without change. It did not follow that rates, fair and reasonable for an average road (which in fact did not exist), would be fair and reasonable for all existing roads."

There is no presumption that the average is true of the particular. The presumption is otherwise, and the plaintiffs, having shown their railroad to be in a comparatively low scale, and thus distant from the average, had no great burden of proof before them in presenting their case to the Commission. It was for the Commission to demonstrate that the general rates prescribed gave the plaintiffs a fair and reasonable return. This the Commission failed to do. More than that, the Commission has by its findings, using its adopted plan and its own methods as applied to plaintiffs' circumstances, proved that plaintiffs have been underpaid \$186,707.06, in fair and reasonable compensation for the period in question. See Finding 23.

"If that which the Commission determined is fair and reasonable compensation for the representative road, it must, we think, be fair and reasonable for any one road that is so represented. The reasons given by the Commission for not ordering payment on the basis of its findings, of the annual sums making up the above total of \$186,707.06 are not convincing or even persuasive. In our opinion, they all overlook the statutory mandate that the compensation to be allowed for carrying the mails must be reasonable, and the constitutional one that it must be just." (R. 48).

In the second place, however, even though to many other roads the same low schedules of pay have been applied, there are many others who operate the same size units of service to whom much higher schedules are applied, some as high as 37½ cents per mile for 15 foot R.P.O. service.\*

\* For the "same kind of service," viz., 15 foot R. P. O. apartments, in the second general *Mail Pay Case*, 144 I. C. C. 655, 718, the Commission prescribed 19½ cents for New England Trunk Lines over 100 miles in length; 27 cents for lines under 100, but over 50 miles, and 34 cents for lines under 50 miles. In the *Intermountain and Pacific Coast Lines cases*, 96 I. C. C. 493 and 151 I. C. C. 734, rates prescribed for lines over 100 miles, 25 cents; under 100 but over 50 miles, 30 cents; under 50 miles, 37½ cents. For the *Alabama, Tenn. & Nor. R. R.*, 112 I. C. C. 151, 186 miles, 25 cents.

On page 11 the defendant, refers to another of the Commission's "Factors" and make the statement that "the total unused space allocated to passenger, baggage, express and mail service constituted 44 percent of the total space operated for these services", as though that fact had some special point. To put it another way, and correctly, the mail, express and baggage used only 56% of the space in the one car they used together. The Commission did not say that 44 unused was excessive, nor was that fact coupled with any claim that it had any real significance. If the defendant intended to cast any slur at the efficiency with which the Georgia & Florida was operated it should be sufficient to quote the following statement by the lower Court.

"Here, however, it is found that "there is no evidence which indicates that plaintiffs' operating costs were excessive in relation to the character of the road and the traffic area, or that such costs were increased by inefficiency, negligence, or uneconomical management or operation by the plaintiffs." (R. 43).

It is perfectly obvious from the record that the Georgia & Florida is a line of very light traffic density, which the record shows is one of the predominant characteristics which it has in common with short lines of less than one hundred miles. The very much lighter loading of passenger cars is one of the marked differences between the great "mass production" low unit cost systems like the Pennsylvania on the one hand, and the short lines and the Georgia & Florida on the other. (Trans. in No. 63 (1937) p. 289). The Commission for that same basic reason gave effect to this difference in prescribing higher compensation for short lines under 100 miles where it could do so on a group basis within the boundaries of its classification scheme; and should have done the same thing for the plaintiff, on the merits of its individual facts, instead of giving effect instead to the desire of the Post Master General to keep a rule of average unimpaired.



On page 11 the defendant repetitiously states that (1) "the Commission also found that 'another element of doubt, as to the reliability of the space study as the basis for determining the cost of service, arises from treating the 3-foot units of authorized mail space as the full space used by mail, regardless of the load carried'"; also that "the Commission mentioned that the space furnished to meet authorizations for 3 ft. units is not set aside for exclusive use but is merely available space in the same car used to carry baggage and express"; and (2) that "in fact, according to the Commission's statistics, considerably less than half the amount of space authorized appears to have been used".

These propositions have already been dealt with (1) at pages 71, 76, 78, *supra*, and the other at (2) page 81, *supra*; and reference is made thereto to avoid repetition.

On page 12 the defendant states:

"Further casting doubt on the cost analysis, the Commission notes that its computations did not take into account the fact that 'expense of transporting mail per authorized car-foot mile, in view of the service rendered by applicant on its trains in connection with it, might reasonably be considered to be somewhat less per car-foot miles than for passenger-train service as a whole'."

There being no evidence to warrant the Commission's assertion it was nothing more than a gratuitous slur made and now repeated merely for the purpose of, as the defendant expresses it, "further casting doubt on the cost analysis".

In any event it will be interesting to contrast this slur with what the Commission said, in a calmer moment, in the first general mail pay case when the Post Office Department had urged that rates should be imposed which would be less

than would be compensatory. The Commission, in firmly rejecting such a proposition at that time, said, *inter alia*:

"In many respects the mail service required differs from that connected with any other. For example, the service must be furnished on demand and must be given preference over any other service performed by railroad passenger trains; and extraordinary care and attention must be given to speed and connections with other trains under penalty of a fine for failure to deliver. These distinguishing features and others that might be mentioned indicate that in some respects the conditions of service are more exact and burdensome than conditions with respect to other services in passenger trains." (56 I.C.C. 1).

On page 12 the defendant repetitiously states that:

"The Commission also compared the revenue respondents received from the mail service with revenue received for other services and found they were receiving per car-foot mile approximately six times as much revenue from mail traffic as from passenger traffic and approximately two and one-half times as much revenue from mail traffic as from express traffic."

This proposition has already been dealt with at page 76, *supra*; and reference is made thereto to avoid repetition.

On page 12 the defendant also states that the Commission computed the average expense per car-foot mile of operating the passenger train service and compared this figure with the revenue received for authorized mail space, and the average computed expense per car-foot mile for passenger train service as a whole was .66 cent; and that the revenue per car foot mile of authorized mail service was 1.03 cents, or 56 per cent more than the average computed expense. Thus, "revenue per car foot mile from the authorized space approaches quite closely the hypothetical

cost per car-foot mile plus the stated return for mail service." It goes on to admit that "this computation does not include, of course, any distribution of mail revenue to unused space apportioned to mail."

The defendant fails to point out wherein it considers this computation has any relevance or materiality. It merely represents it only as a factor upon which the Commission relied; and it goes on to admit that this computation does not include, *of course*, any distribution of mail revenue to unused space apportioned to mail, as such it was merely a delusory mathematical exercise. By a similar, mathematical exercise it could be just as uselessly computed that by using one linear foot of car space per passenger, that if a train ran filled to capacity with passengers, the railroad would receive 2.8903 cents per car-foot miles for the transportation of each passenger, as compared with only 1.0297 cents per mile for requisitioned mail service (Trans. in No. 63 F. 206.354).

From the foregoing examples it is manifest that the various reasons given by the Commission as the "factors" or "circumstances" on which it relied to excuse its disregard of the results of the cost study, are without merit; and do not impair the soundness and accuracy of the cost study as a close approximation of the actual costs. The truth of the matter that the Commission, like Procrustes, was bent upon applying an arbitrary rigid rule of classification desired by the Post Office Department. Of its attempted justification therefore the Court below said:

"The Commission's decision of May 10, 1933, 192 I.C.C. 779, states its position with reference to plaintiff's claim as follows:

"The cost study is not considered to be an accurate ascertainment of the actual cost of service. It is an approximation to be given such weight as seems proper in view of all the circumstances. See Railway Mail Pay, *supra*. The comparison of mail revenue with

other revenue received for services in passenger-train operations shows that mail with relation to the other services is bearing its fair share of the expenses of operation and is contributing relatively more than the other services for the space furnished. Applicant receives the same rates as those received by other roads for the same kind of service. Many of these other roads are, as applicant points out, roads which are very much larger and which have greater traffic and lower unit operating costs. On the other hand many are in much the same situation as the applicant in respect of passenger-train operations. The data submitted fails to justify giving the applicant rates higher than those now paid other railway common carriers for like service."

"We quote rather than paraphrase this; for what it says is important. We are of the opinion that the 'approximation' should be given greater weight than the Commission affords it, because, as we have said, and the Commission in effect admits, there is no such thing as certainty in actual cost. Approximate, or as it is called, 'computed' cost must be relied upon, and as a matter of law must be decisive. There is no alternative or at least no satisfying alternative. Of course there were other methods of computing cost, but the Commission, put to the choice, selected Plan No. 2. And it did not, in the decision of May 10, 1933, abandon Plan No. 2 and select another."

The fact that the plaintiffs' railroad "receives the same rates as those received by other roads for the same kind of service," "is not responsive to the plea that those rates, as to the plaintiffs, are confiscatory. The service is compulsory, economy and efficiency of operation are undisputed. This is not a case where the carrier may cut down its expenses and thus convert the remuneration into one that is fair and reasonable. It has already reached the efficient and economical stage, and if it must carry the mail, the remuneration must fit that situation. Here it has not done so."

The four judges of the Court of Claims were not alone in this view. The opinions of three other judges in the District Court were to the same effect; and, for ready ref-



erence one paragraph from their second decree and opinion is quoted:

"Lengthily are theories and possibilities advanced to establish that a different result might be reached if different methods were employed to ascertain and compute the proportions of operating expense and the separations into expense for freight service and passenger service respectively, but there is no justification submitted for abandoning the method employed in making the first report, which was unchallenged as to accuracy and was admitted to have been apportioned in accordance with the formulas prescribed for Class I roads for the separation of expenses between freight and passenger service." (Appendix B, p. 66).

With respect to other evidence adduced before the Commissioner for the Court of Claims, the following is to be said:

On page 14 the defendant represents that in *September, 1937*, the Post Office Department had initiated a study to determine on what routes mail, being carried on mixed freight and passenger trains, could be diverted to other mail or highway routes (R. 103, 104, 174); that in *June, 1939*, the Division Superintendent of railway mail service had recommended discontinuance of the 15-foot apartment service on the plaintiff's line between Douglas and Valdosta, Georgia, with the substitution of closed pouch service, which would save the Department \$4,870.56 per year (R. 106, 177); but that as a result of the protest against eliminating the financial benefit to the plaintiff, the Department determined not to discontinue the route until the railroad voluntarily curtailed its service (R. 192).

Without more facts these representations are misleading. Witness Hardy testified that he did not become General Superintendent of Railway Mail Service until *May 1, 1939* (R. 129); that shortly thereafter, *May 1, 1939* (R. 99, R. 129), a recommendation was made by the field officials for some curtailment "as an economy proposition only".

but that "the Department received a number of petitions and protests from the patrons along the line" . . . and that "probably the determining factor in my decision was the fact that the railroad company pleaded that we continue the service because of the financial benefits" . . . (R. 99, 100). He later admitted that in all such cases the controlling and primary consideration was the public convenience and necessity (R. 100, 133, 145).

All of the following exhibits were clearly irrelevant, for the purpose offered but nevertheless tend to rebut Witness Hardy's testimony:

Defendant's Exhibit 7 was a copy of letter dated October 10, 1938 from the Chief Clerk of the Railway Mail Service to the Superintendent of Transportation of the Georgia & Florida Railroad to the effect that an investigation was being made as to the comparative costs of rail service compared to motor car or star route service on the Augusta & Madison Railroad post office between Augusta and Valdosta. It disturbingly inquired if the loss of mail pay would seriously affect the finances of the railroad if the service was eliminated, and if the train service was eliminated or discontinued would the communities involved be discommoded or affected adversely by the loss of railroad service (R. 169).

Defense Exhibit 8 was copy of a reply dated October 25, 1938, and was the answer in the affirmative, to the effect that such a change would seriously affect the finances of the railroad, and would undoubtedly curtail train service or eliminate passenger train service entirely; and that the result would be serious or disastrous to the communities affected (R. 169).

Defense Exhibit 9 (R. 171) consisted of a detailed report by the Chief Clerk of District 8 and the acting Superintendent of Railway Mail service to the General Superintendent dated June 21, 1938, with certain sup-

porting documents, in which it is set out that when in the preceding fall, consideration was given to discontinuing all railway post office service between Augusta and Valdosta, not only was there vigorous objection from the public, but that it was not practicable to cover the service by Star Route as the roads are not passable the year around; and there was a sufficient quantity of mail handled between Augusta and Douglas to justify railroad post office service; and the only discontinuance recommended was between Douglas and Valdosta.

Defendant's Exhibit 24 showed that the proposed discontinuance was expressly limited to "an economy proposition only". As such it was disapproved, along with a proposal to discontinue closed pouch service between Valdosta and Madison.

Defendant's Exhibits 7, 8, and 9 were objected to as irrelevant and immaterial because it related only to a period subsequent to the period of the plaintiff's claim. Ruling was reserved until the defense had an opportunity to present farther evidence to connect it up as evidence "as to the importance and value of the route" (R. 104). The record does not indicate that any such connection was ever established that would make said exhibits relevant or material.

The only testimony relevant in point of time was Defendant's Exhibit 23 consisting of copies of railway Post Office inspection reports dated April 7 and 8, 1932, June 7 and 8, 1934, March 14 and 15, 1935, and April 7 and 8, 1937, and perhaps were intended to connect up with Defendant's exhibits 7, 8 and 9.

However, there is nothing in these reports to indicate that anybody had any idea for economy reasons, or otherwise, at time thereof that any part of the service could or should be discontinued. To the contrary, the 1935 and 1937 reports expressly state on their face that service with clerk was justified. The 1937 report on train 4 states "service with clerk justified every day in the week except Sunday. No saving is possible as space and clerk is necessary on that day in train". (R. 131).

With respect to this line of testimony the following is to be said:

*First:* there was no testimony to indicate that the Post Office Department had any authority to grant subsidies to carriers on the ground that they were insolvent, and no witness professed to have acted upon any such theory.

*Second:* the mere fact that sometime in 1937 the Post Office Department had, in general, begun to make studies determining on what routes throughout the country mail carried on mixed trains could be diverted is irrelevant since it did not appear to have done so at that time on the line of the plaintiff.

*Third:* all the testimony relating to anything which occurred after February 28, 1938, and that was most of it, was obviously immaterial; and even if it was it will be noted that in the exchange of correspondence between the Railway Mail Service and the carrier, nothing was said about the applicable rates then or for the future. The Post Office Department well knew at that time that as well as before the rates currently being paid were unsatisfactory, and proceedings were then still in progress to obtain additional compensation. The only presumption warranted by the facts was that the carrier would continue to seek just compensation, and that the Post Office Department con-



tinued to route with the probability fully in mind that the compensation would be enlarged.

*Fourth:* the only evidence which was relevant showed that the period of this claim went to show that there was no question but that the service was justified and was continued on its merits, and not as a matter of indirect subsidy to a needy carrier.

*Fifth:* Whether intended as a veiled threat or not the Post Office Department's inquiry (Defense Exhibit 9) plaintiff deterred from filing its suit more promptly; and explains why it was limited to period ending Feb. 28, 1938.

On page 14 the defendant states "at no time did the plaintiff ever ask to be relieved of the burden of carrying mail" (R. 97). Since the service was taken under authority of law this point is simply irrelevant and immaterial. It is interesting, however, as indicating the lengths to which the defendant feels it needs to strain.

On page 14 the defendant represents that "the Government introduced evidence to prove that between 1931 and 1938, every point of significance on the Georgia & Florida's mail routes was also served by another mail carrier, both by intersecting railroad lines connecting such points directly with Atlanta, Savannah, or Jacksonville, which are the three metropolitan centers for the region served by respondents, and by highway routes (R. 72-89).

The petitioner knows, of course, that the entire service furnished by the respondents could not be replaced by any alternative service available during the period in question or since. That is something so self evident and of such common knowledge that the court could take judicial notice of same, but, anyhow, it was discussed on the record thus:

“Mr. Hitt: May I ask as to what point this testimony is addressed, what it is you are trying to establish, that you are trying to show?”

“Mr. Rood: It will show alternative service available in all these points at the same rates or at cheaper rates and that in fact railroads voluntarily cut their rates below the I.C.C. rates in order to get this business, as it is so profitable to them.

The Commissioner: “Do you mean that a railroad running from Savannah to Atlanta is an alternative service for one running from—

Mr. Rood: Oh, certainly.

The Commissioner: —Augusta, down to—

Mr. Rood: Yes, indeed; the mail service is.

The Commissioner: You mean they take the mail all the way down by Savannah just to get a little cheaper rate?

Mr. Rood: Oh, the mail service is a complete network as is shown here.

The Commissioner: That is not answering my question. I am asking whether a particular service within—that goes back—rather, whether a roundabout service is an alternative—as, for example, down around Savannah and back up to Augusta—is an alternative service for direct routes where there is no emergency. Of course, it could be shipped via Key West if it had to be done.

Mr. Hood: Well, all right.

By Mr. Rood:

Q. 98. Mr. Threadgill, suppose there were no Georgia & Florida Railroad mail from Montgomery, Georgia to Augusta. In that case would it be possible to move mail from Montgomery to Augusta?

A. Do you refer to Vidalia, Georgia, instead of Montgomery?

Q. 99. No, I am just talking about Montgomery. Isn't that the—

Mr. Todd: This is Montgomery County. Vidalia is what you are speaking of.

The Commissioner: The point I am getting at is this:—

Mr. Rood: Oh, I beg your pardon. I do refer to Vidalia, yes.

The Commissioner: The point I am getting at is this: You are trying to make a comparison of the value of a service around by way of Savannah with the direct service through to Augusta by the railroad here in question, on the theory, I presume, that in a suit for the value of land you possibly might be permitted to show the value of comparable land, and it is your position—

Mr. Rood: Adjacent.

The Commissioner: And it is your position, around by way of Augusta is comparable—or around by way of Savannah is comparable to the direct route to Augusta; is that it?

Mr. Rood: Strictly—

The Commissioner: Is that it?

Mr. Rood: Yes, sir.

The Commissioner: Yes. Well, I will sustain an objection on the ground that they are not comparable.

Mr. Hitt: I object, on the ground they are not comparable. Star routes are not comparable, and the alternatives by rail are not comparable.

The Commissioner: It is very doubtful. Many jurisdictions reject proof of value of comparable properties in any event, but here a sustain the objection that they are not comparable.

Mr. Rood: Yes, I except.

By Mr. Rood:

Q. 100. Mr. Threadgill, suppose you had a parcel post package going from Vidalia, which is in Montgomery County—I had those two names mixed up before, on the map here—from Vidalia to Washington, D. C. Could that move on the railway mail train to Augusta?

A: It could.

Q. 101. Could it move on the railway mail train to Savannah?

A. It could.

Q. 102. Either way?

A. It could.

Q. 103. As a matter of fact, which is the most frequent service?

A. Well, the Savannah-Montgomery R.P.O. has only one train in each direction at present. They have had

more frequent service but at present they have only one train in each direction.

Q. 104. Well, the timetable here shows a trip out of Vidalia at 5:20 p.m. Is that what you refer to?

A. That is one of the trains on the Savannah and Montgomery R.P.O.

Q. 105. And then I see a trip from Vidalia to Savannah at 7:20 a.m. What is that?

A. That is star route service.

Mr. Hitt: Mr. Commissioner, I object to this.

The Commissioner: Sustained.

Mr. Rood: Well, Your Honor, if we can't prove market value by the value of adjacent properties, we are in a bad spot here.

The Commissioner: I told you it was my view of it that they are not comparable services. At the time these trains were running the others were not comparable because they were much further around, going to different places. You have to go into the whole setup and organization of the other railroads to show if there is a comparable situation.

Mr. Rood: Well, I say, now, on a parcel post shipment from Vidalia to Washington, D. C. My witness says they can go equally either way.

The Commissioner: He just didn't say they go equally. He said he didn't ship them from one place over the route that could be shipped the other way. He didn't say there was an equal choice at the time the trains were running.

By Mr. Rood:

Q. 106. Well, Mr. Threadgill, which is a preferable route from Vidalia to Washington, D. C., for a parcel post shipment?

A. It would depend on the time the parcel is placed in the post office.

Q. 107. Do you mean to say it would go on the next train, generally speaking, as a rule?

A. Not always.

Mr. Hitt: I object to that. I don't see where that leads us anywhere.

Mr. Rood: Well, if the only difference is the trains go at different times, that is comparable.

Mr. Hitt: It is true that if a town isn't served by one line of railroad, why, the government can serve it



by another line of railroad or by a star route to get it there somehow. There are no insuperable difficulties to keep them from getting mail to a town by star route; but when it comes to these services by traveling post offices, why, they have a post office where they can assort the mail en route and distribute it as they like going down another line of road to various and sundry towns.

Mr. Rood: My witness didn't say that the Vidalia-Savannah route is a traveling post office.

Mr. Hitt: Yes.

The Commissioner: But the other post office cannot possibly serve the towns which this one is serving. Yes, it can serve Washington, D. C., and it can carry distance between certain terminal points, but it cannot possibly serve the towns in between, and that is the reason they have got it." (R. 80 to 83).

On page 15 the defendant represents that "the Government offered to prove that the entire service involved in this action could have been adequately replaced at no increase in cost (R. 83, 96-97).

The plaintiff respectfully submits that the defendant is mistaken.

The defendant's first offer of proof was made in the following setting and form:

Q. 109. Mr. Threadgill, now if there were no Georgia & Florida Railroad, what would the post office do to move mail from Vidalia to Washington?

Mr. Hitt: I object as being irrelevant, and immaterial.

The Commissioner: Objection sustained.

By Mr. Rood:

Q. 110. What would it do to move mail to Augusta?

Mr. Hitt: I also object to that.

The Commissioner: Objection/sustained.

Mr. Rood: To Augusta?

The Commissioner: Yes.

Mr. Rood: I except to the Commissioner's rulings, respectfully. Is it understood that exception is reserved?

The Commissioner: You have a right under the rules to except, you don't have to get any permission. However, if you want to gain anything by it you better make an offer of proof.

Mr. Rood: Do I have to note the exceptions each time?

The Commissioner: Yes, each time you should note it.

Mr. Rood: Yes. All-right.

I now offer to prove that, if the Georgia & Florida Railroad ran no mail trains at any time from 1931 to the present, the buyer of the mail service on that railroad (that is to say the Post Office Department) would be able to employ adequate alternatives at a financial saving, to move mail out of Vidalia to any point in America served by any other railway route or star route or R.F.D. route." (R. 83).

*First*, it will be noted that this first offer is limited to Vidalia alone and not to the entire service furnished by the plaintiff.

*Second*, it will be noted that the predicate of that offer was an assumption, contrary to the fact that "if the Georgia & Florida ran no mail trains at any time from 1931 to the present"; whereas the offer was made in the present tense, to show that now the Post Office Department "would be able to employ adequate alternatives at a financial saving \* \* \* \* \*".

Since plaintiff's claim relates to a period to Feb. 28, 1938 what the Post Office Department might or might not now do is irrelevant and immaterial.

*Third*, there is an ambiguity in the word "adequate" in the sense that what might, in the absence of any other alternative, be adequate to get the same volume of mail transported between Vidalia and the rest of the world if there was not in existence any passenger train service directly available between Vidalia and other post office points on the line of the Georgia & Florida, would be a very different thing from what would be adequate as an alternative when service by direct passenger trains operated by the plaintiff

between Vidalia and other post office points on its line does exist.

The defendant's second offer of proof was made in the following setting and form:

(Witness Stephenson)

Q. 42. (By Mr. Rood) Well, now, on those routes that are shown in Exhibit 2, I see Atlanta and Jacksonville R.P.O. furnished by the Southern Railway, with mileage 330. Down below I see Atlanta, Valdosta, and Jacksonville R.P.O. furnished by the Georgia, Florida & Southern Railway, with mileage 349. Now, do you pay for that local route a higher compensation on mail carried from Atlanta to Jacksonville?

A. We pay the shorter mileage. The company has agreed to equalize the mileage. The Central of Georgia and the Atlanta Coast Line equalizes with the Southern Railway.

Q. 43. Are there any other illustrations of equalization in Georgia?

A. The Central of Georgia equalizes with the Southern Railway between Atlanta and Macon, and the Atlantic Coast Line equalizes with Seaboard Air Line between Washington, D. C., and Jacksonville, Fla.

Q. 44. Well, now—

Mr. Hitt: May I ask, what is the object of this line of questioning? Does this go to the same thing that was excluded yesterday, that there is no comparability between these routes?

Mr. Rood: This shows that on R.P.O. service parallel railroads in the same place are willing to accept a still lower rate to get the business. The post office is under an obligation to pay the standard rates furnished by the L.C.C. Since that is so, the cheapest rate to the post office would be the short line; and lines which are longer than the short line, the cases just mentioned by Mr. Stephenson, voluntarily waive their rights to compensation for the mileage on their route which is in excess of the short line distance.

The Witness: That is for the through mail, through mail going over those lines only.

Mr. Rood: Yes.

Mr. Hitt: I appreciate what you are saying, Mr. Stephenson, and I object to the line of testimony because there is no line of comparability here with the Georgia & Florida. That is the ground of my objection.

The Commissioner: The objection is sustained.

Mr. Rood: I offer to prove that other railroads operating mail routes carrying mail through the same towns which are served by the plaintiffs' routes are so anxious to get the business that they voluntarily come to the post office and offer to accept rates lower than the rates prescribed by the Interstate Commerce Commission. They do that by, I think, waiving compensation to mileage above the short line mileage.

By Mr. Rood:

Q. 45. Is that correct, Mr. Stephenson?

A. That is right.

The Commissioner: Very well. The objection is sustained. You may make your offer of proof.

Mr. Rood: Yes. I offer to prove through this and other witnesses that—

The Commissioner: Through this witness.

Mr. Rood: Through this witness, then: That if the post office decided not to ship mail over the Georgia & Florida Railroad, but used the Star Routes exclusively, and the other railway routes which were shown to serve every stop yesterday except two, that the post office would make an annual saving not only of the amounts paid the railroad for the R.P.O. and the closed pouch service, but also all of the amounts shown in column 3 of Exhibit 6, and a large percentage between a third and a half, of the amounts shown in column 4 of Exhibit 6. (R. 95, 96, 97).

This second offer of proof merely goes to the point that it would be possible to use Star Routes and other railway routes at an annual saving, but it does not even purport to be an offer to prove that either the Star routes or the other



round-about railway routes would or could be an adequate substitute for direct service over the line of the plaintiff.

On page 15 the defendant represents, briefly, that "the evidence also established that plaintiff's receipts from mail traffic constituted net additions to its revenue" (R. 35, 113).

The respondent respectfully submits that the defendant merely put in testimony upon the apparent theory that the respondent would have no claim if it can be made to appear that the compensation for handling the mails was sufficient to pay something above the bare "out-of-pocket" costs directly attributable to the handling of mail which would not have been necessary if the railroad had been operated anyhow without mail.

If there was any validity in such a theory as a yardstick for determining mail pay compensation it should be just as good as a yardstick for determining the level of compensation to which carriers might be entitled to expect for the performance of freight and passenger services. Therefore, the respondent respectfully submits, before this theory could have a valid application, there would have to be combined with it some provision by which to bridge the gap between (1) the total cost and burden of furnishing the property and operating the railroad and (2) the mere "out-of-pocket" costs directly attributable to each kind of traffic. Otherwise this theory is in the same category as that of perpetual motion.

There are types of situations in which the ascertainment of "out-of-pocket" costs are really useful, such as where the dispute to be resolved is whether a given volume of traffic or revenue yields enough revenue to cover the "out-of-pocket" cost. This often occurs in proceedings on applications to the Interstate Commerce Commission for authority to abandon unprofitable branch lines. In such proceedings the applicant usually supports its application with figures to show *the branch* for which authority to

abandon is sought, is losing money, while the opposition usually contends that *the parent system as a whole*, makes money on traffic originating or terminating on the branch.

In such cases the problem for the Commission is to find whether the branch is such a burden on interstate transportation that the public interest requires its abandonment; hence, it is relevant, and often of controlling importance, to know whether or not the branch contributes enough traffic for the system as a whole to earn the "out-of-pocket" cost of keeping it going.

Also, in some types of rate cases, but by no means all, definite information on "out-of-pocket" costs is often a relevant and material aid of a sound decision as to whether or not the public interest requires the granting to lines forming longer routes, relief from the prohibitions of the fourth section of the Interstate Commerce Act against charging less for a long haul than for a short one.

In any event, it does not follow that because "out-of-pocket" cost studies are useful and relevant in some types of proceedings before the Interstate Commerce Commission under the Interstate Commerce Act, that they are also useful or material or relevant in proceedings under the Railway Mail Pay Act. Nothing in the record goes to show wherein an "out-of-pocket" test would in any way be either relevant or useful or material in the present case.

On this proposition the lower Court among other things well said:

"At a hearing on this case by a commissioner of this court February 18, 1946, a witness for the defendant, the Chief of Section, Cost Section of the Bureau of Transport Economics and Statistics, who was acknowledged in Senate Document No. 63 as especially contributing in the preparation of the cost study (therein), stated, in response to a direct question as to whether the present cost formulae were much better than the cost formulae used by the Commission in 1928 or in 1931:

Well, in 1928 and 1931 the Commission did not have really any cost formulae. They still haven't got any cost formulae, but the Cost Section was formulated for the express purpose of determining cost formulae for that they might be used by the Commission in gathering costs and might be distributed to the carriers so they would have means and procedures for gathering those costs. \* \* \* (R. 43).

"The 'out-of-pocket' or 'added' cost theory has been injected into the case (findings, 31-33), but we are not convinced that additional service is in any different situation than the service to which it is an addition, as far as computing fair and reasonable compensation is here concerned. We think there is just as good reason for considering express as the added service rather than the mail. The fact that a carrier is only too glad, perhaps anxious, to carry mail to help cover otherwise wasted floor space, is understandable. But that is no reason why the mail should be carried at 'bargain' rates. A passenger who goes aboard a train after the coach has already accumulated a paying load, must nevertheless, and rightly so, pay full fare, along with all the rest. Cf. *Fred R. Comb Co. v. United States*, 103 C. Cls. 174, 183. We do not say that the added cost or out-of-pocket theory, with its implications, is inapplicable in all cases. But the theory, if we are to believe the witnesses, has not matured into practice in the determination of mail pay." (R. 45).

"We cannot agree that the basis of compensation is to be governed by the added or out-of-pocket cost theory. It was not applied in Plan No. 2, as that plan is explained to us, and we cannot find that plan grossly erroneous. The plan applied to a group gave certain rates, but the rates good for the group did not fit plaintiffs' road. The plan applied to the plaintiffs' road gave higher rates than to the average road and are the only rates presented in the Commission's decisions that give the plaintiffs fair and reasonable compensation. The plaintiffs here are entitled to them. The

average road has no physical existence and the general rates put into particular effect would mean greater or less compensation for the individual carrier. But the governing statute was careful to make provision whereby the rates might not be confiscatory for any one road." (R. 47).

On page 16 the defendant represents that "relying on the Commission's finding that an increase of 87.4 per cent of the rates paid would be necessary to provide compensation for costs and an adequate return on investment by a mathematical application of the cost allocation formula in Plan 2, the Court below held as a matter of law that the application of the formula was mandatory".

If the defendant meant to give the court the impression that the lower court had held that the cost allocation employed in this case had the force of law, it is respectfully submitted that it is not correct. What the lower Court truly said, *inter alia*, was:

"But had we the actual cost it would serve only as a guide, a cost to be considered, but not necessarily to govern, in arriving at fair and reasonable compensation. The question is, rather: what is the fair and reasonable cost? For we cannot proceed from an unfair and an unreasonable cost toward a fair and reasonable compensation.

Here, however, it is found that 'there is no evidence which indicates that plaintiffs' operating costs were excessive in relation to the character of the road and the traffic area, or that such costs were increased by inefficiency, negligence, or uneconomical management or operation by the plaintiffs.

Nowhere in the Commission's findings or conclusions in plaintiffs' case do we find even an intimation that the so-called "actual" cost, whatever it might be, was anything but fair and reasonable. What we do find is that, on the facts as found and stated by the Commission, there is an erroneous conclusion of law



by the Commission that plaintiffs have been fairly and reasonably compensated for their mail service." (R. 43).

"The so-called 'computed' cost being the only cost that can be used, it must fairly and reasonably be computed. To what extent it approaches a fair and reasonable cost not in excess of actual cost is a matter not yet within the ability of the Commission to determine. It is a question that must be answered by good judgment, by those peculiarly fitted and equipped to ascertain the requisite facts as to such cost and exercise that judgment. Congress has chosen the Interstate Commerce Commission to perform that function, and it has done so.

As the Supreme Court has said, this Court has jurisdiction to render judgment of recovery for an amount sufficient to constitute fair and reasonable compensation under the facts as found by the Commission, unpaid through failure of the Commission, because of an error of law, to order payment thereof.

Under Finding 16 herein, it is shown that the Interstate Commerce Commission found and determined that plaintiff would require an increase in its mail revenue of 87.40% in order to secure for itself, under Plan 2 adopted by the Commission, a return of 5.75% theretofore fixed by the Commission on its investments in road and equipment engaged in mail traffic. This determination was based on the calendar year 1931 test period. The Commission's findings were determined upon an apportionment of passenger equipment used for mail traffic on the basis of space hired or required for carrying the mail.

"Railroad expenses are not generally applicable as direct costs but require apportionments. The Commission did not, under Plan 2, which it adopted and which we must accept, determine actual costs of various operations." (R. 43, 44).

"In view of the record presented the basis employed by the Interstate Commerce Commission, that is to say Plan No. 2, appears to be fair and reasonable. The

studies made are in no wise shown to be out of line with the then state of the art, science, or profession of statistical analyses and cost accounting.

The deficit found in plaintiffs' mail operations was ascertained according to the formula suggested by the Government and used by the Commission to prescribe rates for general application. As we have pointed out, the ascertainment of fair and reasonable compensation must proceed from a fair and reasonable basis. The Commission, by its use of Plan No. 2, has adjudged it to be a fair and reasonable basis. And out of that basis there has been ascertained, by formulae prescribed by the Commission, "what is the fair and reasonable compensation for plaintiffs' carriage of the mails beginning the first of April 1931; and ending at the close of February, 1938. Fair and reasonable compensation cannot be both a deficit and the amount of \$186,707.06 so found. It is, we conclude, the latter." (R. 46).

On page 11, and again on page 60, the defendant asserts that in other mail pay proceedings "consideration" had been given to other factors besides the cost study. An unspecified claim that "consideration" has been given is a highly ambiguous statement which, as in this case, usually means little or nothing. For example: one of the "factors" which it is alleged that the Commission considered in other cases was "the actual space occupied by mail, as distinguished from authorized space"; but it is impossible to determine from a close reading of the reports in the three cases cited that any weight whatever was given such a "factor," as the following demonstrates:

*Altermann and Pacific Coast Short Lines case*: "in 95 L.C. 493 (in which an increase of 100 per cent was awarded) one of the contentions those carriers made, with substantiating proof, was that the size of packages and parcels in that territory are larger than the national average. The Post Office Department, however, cited instances in which the amount of mail carried was not sufficient to fill the authorized unit (Page 499). The Commission disposed of that contention then by pointing out that the par-

ties had agreed to use the space authorized as the space used, and that in respect to the loading, "that no tests were made on the lines of any of the carriers herein" (Page 497). The Commission went on to say further that "the proper count to apply, where the mail handled by any carrier or carriers continually differs from the general run can readily be ascertained by such carrier or carriers and the department and this should be done when necessary".

That certainly does not indicate that the extent of the use made of the space authorized entered into the rates of compensation fixed per unit of space, or included any sort of an allowance for a greater or a lesser number of packages actually transported on an authorization for any given unit of closed pouch service.

The *Seaford General Railway Mail Pay Case*: (144 L.C.C. 675, decided July 10, 1928). There are recitals (1) at page 677 that the Railway Mail Pay Committee (representing trunk roads generally) had presented evidence to show that there had been a substantial increase in the weight of mail matter carried in the various sizes of space; and (2) at pages 705, 706, that the associated short lines group had presented various exhibits comparing revenue from mail pay space with revenues with freight and passenger, one of which showed that revenues under less car load freight rates in all cases were substantially higher (on the same weights) than the mail revenues from a fully loaded three foot unit of closed pouch passenger train service. No further reference was made to (1), the increase of weight in space units, and the respondent is unable to find anything to even remotely indicate that in that general mail pay case the Commission really gave the slightest weight to the extent to which a three foot closed pouch of authorization was or was not used in fixing the rates of compensation for any of the units of space.

On the other hand, in the *Denver & Salt Lake Case* (151 L.C.C. 734, the case of the Denver & Salt Lake Railroad, a

carrier in the Rocky Mountains, and also of certain short lines in that region, the Post Office Department undertook both to (1) measure the space actually occupied and (2) count the number of packages actually handled, instead of relying upon the respective authorizations for space, but so far as is apparent in the decision, the Commission merely discarded those contentions and gave real consideration only to the amount of space authorized.

In other words, all three contentions were merely discussed and (1) the actual measurement and (2) the count of pouches, passed by in favor of the authorized space basis. In that connection the report said:

"The carriers protest the use of either measured space or space determined upon the count basis without regard to the space authorized. They insist that the authorized basis is the only proper one because the space authorized is the space which they are obligated to furnish, regardless of how much may be carried. They also point to the fact that the space authorized in units less than 30 feet is itself based upon the number of sacks or parcels awaiting transportation; that such space, with a minimum of three feet, is determined upon the number of pieces of mail matter per 3 feet of space, the number used being the average number of pieces required to fill such space based upon the average for the country as a whole. In the instant proceeding, as in the prior one involving these same roads, the carriers contend that the average number used in determining the amount which will completely fill a three-foot unit is too large because the average size of parcel-post packages on their lines exceeds the average for the country as a whole. No separate tests were made by them to determine this, reliance being placed by them upon testimony of baggage-men, etc., and photographs of packages of parcel-post matter."

"As a matter of fact, none of the three services is handled in the car in that manner. In actual operation, all the matter is piled in station order, generally with no attempt to segregate it according to the services to



which it may belong and with no attempt to confine it to a specified limit of space. The measurements, however, afford some approximate check upon the relation between space assumed to be used and the space authorized. The results of each method may be compared.

Having said that, the Commission then proceeded to consider and dispose of the case on the usual space study basis without any more said to indicate any further consideration was given to the extent of the use of the authorized space in fixing the rates per unit of space.

In any event the plaintiff does not contend that the Commission cannot give due consideration to any factor in the record in this case would be relevant to a proper evaluation of the cost study, but here that is not the case. The Commission did not show any of its claimed "factors" had any weight. It simply threw the results of the cost study entirely "out of the window", and arbitrarily substituted a conclusion not supported by the evidence in this case for which it reached back and grabbed out of its decision in another case years before on different evidence.

MOULTRIE HITT.

SUPREME COURT, U. S.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 198

ALFRED W. JONES, RECEIVER FOR GEORGIA & FLORIDA  
RAILROAD,

*Petitioner,*

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE  
COURT OF CLAIMS OF THE UNITED STATES

MOULTRE HITT,  
*Counsel for Petitioner.*

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

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No. 198

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ALFRED W. JONES, RECEIVER FOR GEORGIA & FLORIDA  
RAILROAD,

*Plaintiff,*

*vs.*

THE UNITED STATES

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**PETITION FOR WRIT OF CERTIORARI TO THE  
COURT OF CLAIMS OF THE UNITED STATES**

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*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

The petitioner, Alfred W. Jones, sole and successive receiver of Georgia & Florida Railroad, prays that a writ of certiorari be issued to review the judgment of the Court of Claims of the United States entered April 5, 1948, in favor of William V. Griffin and Hugh William Purvis, Receivers for Georgia & Florida Railroad, plaintiffs, No. 45622, on the principal sum of their claim, but against them on the award of interest on said claim (Ct. Cl. R. 42).

**Opinion Below**

The Opinion of the Court of Claims (R. 12) is Reported at 77 Fed. Supp. 197.

## Opinions In Prior Proceedings

Previous opinion of the Supreme Court of the United States in *U. S. v. Griffin*, No. 63 October Term 1937, is reported at 303 U. S. 226, 82 L. Ed. 764.

Opinions in prior proceedings are set out in transcript of record in the Supreme Court of the United States, No. 63, October Term, 1937 (303 U. S. 226), *United States of America and Interstate Commerce Commission, appellants v. W. V. Griffin and H. W. Purvis, Receivers for Georgia & Florida Railroad*, appeal from the District Court of the United States for the Southern District of Georgia (Ap. Ex. 1, R. 57), viz:

Opinion and Order of the Interstate Commerce Commission May 10, 1933 (Trans. No. 63 (1937, R. 5)) (R. 9 \*) is reported at 192 I. C. C. 779.

Opinion and Order of Three Judge United States District Court for the Augusta Division of the Southern Judicial District of Georgia, January 23, 1935 (Trans. No. 63 (1937, R. 29) R. 57) 2

Opinion and Order of the Interstate Commerce Commission, Feb. 4, 1936 (Trans. No. 63 (1937, R. 41) R. 82); reported at 214 I. C. C. 66.

Opinion and Order of Three Judge United States District Court for the Augusta Division of the Southern Judicial District of Georgia Feb. 23, 1937 (Trans. No. 63 (1937, R. 55) R. 102).

## Jurisdiction

The judgment of the Court of Claims was entered April 5, 1948 (R. 50). The jurisdiction of this Court is invoked under the Act of February 13, 1925, C. 229, Section 3, 43

\* Page references to Trans. in No. 63 (1937) are to the side folio numbers.

Stat. 939, as amended May 22, 1939, C. 140, 53 Stat. 752, 28 U. S. C. A. 288.

### Questions Presented

1. Whether the Court of Claims should have allowed interest upon the claim for a compulsory taking of property and services under statutory authority within the meaning of the Fifth Amendment.

2. Whether the Court of Claims should not have determined compensation under the Fifth Amendment as well as to give effect to an authorized order of the Interstate Commerce Commission as properly construed.

### The Statute Involved Is

The Railway Mail Pay Act of July 28, 1916, 34 stat. 412 et seq., 39 U. S. C. A. 523 et seq., as set out in Appendix A.

### Statement

*The Special Findings of Fact by the Court below constitute an excellent comprehensive statement of the case, but, for the purpose of this petition the matter is stated more succinctly thus:*

(1) This action was brought in the Court of Claims pursuant to the express opinion of the Supreme Court of the United States in a prior proceeding between the same parties and on the same cause of action, that, while a three judge District Court did not have jurisdiction under the Urgent Deficiencies Act; (a) if the Commission makes the appropriate finding of reasonable compensation but fails because of an error of law to order payment of the full amount which the railroad believes is payable under the finding, the Court of Claims has jurisdiction of an action for the balance; and (b) since the mail service is compulsory the Court of Claims.

would, under the general provisions of the Tucker Act have jurisdiction also of an action for additional compensation if an order is confiscatory, *U. S. v. Griffin*, 303 U. S. 226 (Finding 20, R. 26); and that "while the compensation fixed in a railway mail pay order is ordinarily measured by a rate, the ultimate question determined . . . is . . . the proper compensation to be paid by the government to the railroad for services and the use of its property—the *quantum meruit* for carrying the mails (*U. S. v. Griffin*, 303 U. S. 226, 237).

(2) The service requisitioned by the Post Office Department was ordered on a space basis, and consisted of two minimum types of service, viz.:

(a) *The R. P. O. service*, the major part of the total service so requisitioned, consisted of furnishing the Post Office Department with the exclusive use of fifteen linear feet of space in a passenger car fitted and equipped, as specified by the Post Office Department, for a travelling post office (Pl. Ex. 19, R. 233), lighted, heated, cleaned and maintained (all at the railroad's expense), with postal clerks in charge, to take on and sort in transit, and put off the mail at stations along the route, together with the transportation thereof (Finding 4, R. 14) and (Finding 21, R. 26). For this service the rate of compensation previously fixed, by force of arbitrary classification in an average with the larger carriers (Finding 10, R. 18) and (Finding 13, R. 21), was at the rate of only 14½ cents per mile (Finding 22, R. 27).

(b) *The closed pouch service*, a minor part of the total service so requisitioned, consisted of having the railroad's passenger train employees take on, put off, and care for in transit, mail pouches and parcel-post packages of any quantity which would not exceed a quantity which, if piled six feet high (with a passage between), would occupy not



more than three linear feet of the length of a passenger car (Finding 4, R. 14 and Finding 13, R. 19). For this closed pouch service the rate of compensation previously fixed by force of arbitrary classification in an average with larger carriers (Finding 13, R. 21), was at the rate of only  $4\frac{1}{2}$  cents per mile (Finding 22, R. 27):

(3) On April 1, 1931, the carrier to escape the evil of an arbitrary classification with other lines, instituted a new *separate* proceeding before the Interstate Commerce Commission, as provided for by the Railway Mail Pay Act (R. 53). In that new proceeding that Commission made a finding that the joint cost study after adjustments to which the carrier consented to satisfy the Post Office Department that it would be entirely fair, indicated that an increase of 87.4% would be necessary to overcome the deficiency in net railway operating income under the respective rates of (a)  $14\frac{1}{2}$  cents and (b)  $4\frac{1}{2}$  cents per mile, and to provide respectively, a return on that part of the carriers' investment allocable to mail service at the rate of 5.75% per annum (Finding 23, R. 27) .

(4) The Post Office Department admitted that the plaintiffs were underpaid (Trans. in No. 63 (1937) R. 144), but, nevertheless insisted, for administrative convenience, that the compensation for plaintiffs be held down to not more than the rate previously prescribed on an average basis for lines over 100 miles in length (Trans. in No. 63, R. 142, 143, 144, and Pl. Ex. 1, R. 59, 60, 63).

(5) The Commission, despite its own finding that the cost study showed that an increase of 87.4% was necessary, and without genuine justification decided as the Post Master General desired, by ordering that the compensation for the applicant should continue at the same rates average which had been prescribed in a prior case (144 I. C. C. 675) for all

railroads over 100 miles in length (Finding 16, R. 22 and Finding 18, R. 25).

(6) For relief from the Commission's arbitrary action the claimant twice sought, by procedures under the Urgent Deficiencies Act and after hearings, arguments and briefs, obtained from a three judge United States District Court for the Augusta Division of the Southern District of Georgia decrees for injunctions against the Commission's orders as not being in compliance with the duty on the United States to pay "fair and reasonable compensation" and as not being "just and equitable" (Finding 17, R. 24, and Finding 19, R. 19). (See Appendix B hereto, from Trans. in No. 63, R. 57, 102.

(7) The Commission prosecuted an appeal from the said second decree and this Court held thereon that the three judge District Court did not have jurisdiction, but that there was a proper remedy through the Court of Claims (Finding 20, R. 26).

(8) In the Court of Claims the plaintiffs introduced evidence to support their claim under both heads, viz.:

(a) That the Commission had made an error of law; (b) and that its order was confiscatory (Findings 15 to 23, R. 21 and Findings 24 to 30, R. 28).

(9) The lower Court made an award for the principal sum of \$186,707.06 (R. 50); but denied interest on the ground that to do so was forbidden by Section 177 Judicial Code as amended, because they were giving effect to an order of the Interstate Commerce Commission as properly construed, and not determining compensation in an original proceeding under the Fifth Amendment (R. 49).

(10) The plaintiff is satisfied with the amount of the principal sum of the Court's award as being proper under

either head, but it respectfully submits that under both heads (a) and (b) the issue was one for the determination of the just compensation required by the Fifth Amendment, for the taking of property by statutory authority, hence interest is necessary to make just compensation full and complete.

### **Specification of Errors To Be Urged**

The Court of Claims erred in respect to the following:

(1) In failing to award interest to make just compensation full and complete since the claim was for the compulsory taking of property and services (*U. S. v. Griffin*, 303 U. S. 226, 82 L. Ed. 764).

(2) In failing to hold that it was determining a claim for just compensation required by the constitution, whether it was (a) giving effect to an order of the Interstate Commerce Commission as properly construed, or was (b) determining just compensation because the order of the Commission was confiscatory (*U. S. v. New York Central R. Co.*, 297 U. S. 73, 73 L. Ed. 619); and (*U. S. v. Griffin*, 303 U. S. 226, 82 L. Ed. 764).

### **Summary**

The statement of the case so sets out the facts, and, likewise, the specification of errors so sets out the issues—that any further summarization would be repetitions. If the judgment of the Court of Claims in the award of the principal sum is sustained, the substantial issue to the plaintiffs is the failure of the lower Court to award an additional amount for interest so as to make just compensation full and complete.

## Reasons for Granting the Writ

### Specification of Error 1

(1) In failing to award interest to make just compensation full and complete since the claim was for the compulsory taking of property and services (*U. S. v. Griffin*, 303 U. S. 226, 82 L. Ed. 764).

The plaintiff respectfully submits that this Court has already decided that the requisitioning of mail transportation under the Railway Mail Pay Act is a taking for which just-compensation is a constitutional right. In construing this Act, this Court said in *U. S. v. New York Central R. Co.*, 279 U. S. 77, 78, 73 L. Ed. 619, that "the Government admits, as it must, that reasonable compensation for such required services is a constitutional right" (Italics supplied). Again, in *U. S. v. Griffin*, 303 U. S. 226, 238, 82 L. Ed. 764, when this same cause of action between the same parties was before it, this Court reiterated the proposition that railway mail service is compulsory.

The plaintiff further respectfully submits that for a compulsory taking by statutory authority the requirement of the Constitution that "just compensation" shall be paid is comprehensive, and one of the essential elements of just compensation is that of interest when the taking precedes the payment; hence the general rule that the United States will not be held liable for interest on unpaid accounts and claims does not apply. This Court said as much in the case of *Seaboard Air Line v. United States*, 261 U. S. 302, 405, 67 L. Ed. 664, 670, viz.:

"The Constitution safeguards the right and § 10 of the Lever Act directs payment (Italics supplied). The rule above referred to that, in the absence of agreement to pay or statute allowing it, the United States will not be held liable for interest on unpaid accounts and claims, does not apply here. The requirement that



"just compensation" shall be paid is comprehensive, and includes all elements, and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation."

It is true that in the said *Seaboard Air Line* case, the property involved was in the form of land, but it was not a case of condemnation. In that instance there, as here, there were statutory provisions for payment, in which nothing was said about interest, and the Court further said:

"Section 10 of the Lever Act authorizes the taking of property for the public use on payment of just compensation. There is no provision in respect of interest. *Just compensation is provided for by the Constitution, and the right to it cannot be taken away by statute. Its ascertainment is a judicial function. Monongahela Nav. Co. v. United States, 148 U. S. 312, 327, 37 L. Ed. 463, 468, 13 Sup. Ct. Rep. 622*" (Italics supplied).

More recently in *U. S. v. Goltra*, 342 U. S. 203, 208, 85 L. Ed. 776, 781, this Court explained the principle further when it said:

"In the *Seaboard Air Line R. Co.* case § 10 of the Lever Act (August 10, 1917, 40 Stat. at 1, 276, 279, chap. 53) authorizing the taking by eminent domain of property for the public use on payment of just compensation was under examination. It contains no specific provision for interest. This Court held that a taking under the authority of § 10 required the just compensation "provided for by the Constitution" and that such compensation is payable "as of the time when the owners were deprived of their property". This case, however, and the others cited in the preceding paragraph, involve the requisitioning or taking of property by eminent domain under authority of legislation. *The distinction between property taken under authorization of Congress and property appropriated*

*without such authority has long been recognized''  
(Italics supplied).*

The Constitution sets up no rule for discrimination between real property and property of other kinds where property is taken under authority of a statute, and therefore, the petitioner-plaintiff respectfully submits that this taking of property, duly authorized by a statute, is within the protection of the constitutional requirement for just compensation which must necessarily include interest from the time of taking in order for it to be full and complete.

### *Specification of Error 2*

In failing to hold that it was determining a claim for just compensation required by the Constitution, whether it was (a) giving effect to an order of the Interstate Commerce Commission as properly construed, or was (b) determining just compensation because the order of the Commission was confiscatory (*U. S. v. New York Central R. Co.*, 279 U. S. 73, 73 L. Ed. 619); and (*U. S. v. Griffin*, 303 U. S. 226, 85 L. Ed. 776).

Specification of Error 2 is intended both to supplement specification of Error 1; and also to preserve points of law in case the defendant should make any contention that the decision in the Court below was not rested upon either of the (a) and (b) heads of jurisdiction of that Court as expressly determined by this Court in *U. S. v. Griffin*, 303 U. S. 226, 85 L. Ed. 776. ✓

WHEREFORE, it is respectfully prayed that this petition for a Writ of Certiorari be granted.

Respectfully submitted,

MOULTRIE HITT,

*Attorney for Alfred W. Jones, Receiver  
for Georgia & Florida Railroad, Petitioner;*

*601 Tower Building,  
Washington, D. C.*

Filed: August 5, 1948.

**APPENDIX A****RAILWAY MAIL PAY ACT OF JULY 28, 1916**

Sec. 5. That the Postmaster General is authorized and directed to readjust the compensation to be paid to railroad companies from and after the thirtieth day of June, nineteen hundred and sixteen, or as soon thereafter as may be practicable, for the transportation and handling of the mails and furnishing facilities and services in connection therewith upon the conditions and at the rates hereinafter provided. (28 U. S. C. 524)

The Postmaster General may state railroad mail routes and authorize mail service thereon of the following four classes, namely: Full railway post-office car service, apartment railway post-office car service, storage-car service, and closed-pouch service. (28 U. S. C. 525)

Full railway post-office car mail service shall be service by cars forty feet or more in length, constructed, fitted up, and maintained for the distribution of mails on trains. The authorization of full railway post-office cars shall be for standard-size cars sixty feet in length, inside measurement, except as hereinafter provided. (28 U. S. C. 526)

Apartment railway post-office car mail service, shall be service by apartments less than forty feet in length in cars constructed, fitted up, and maintained for the distribution of mails on trains. Two standard sizes of apartment railway post-office cars may be authorized and paid for, namely, apartments fifteen feet and thirty feet in length, inside measurement, except as hereinafter provided. (28 U. S. C. 527)

Service by full and apartment railway post-office cars and storage cars shall include the carriage therein of all mail matter, equipment, and supplies for the mail service and the employees of the Postal Service or Post Office Department, as shall be directed by the Postmaster General to be so carried. (28 U. S. C. 529)

Closed-pouch mail service shall be the transportation



and handling by railroad employees of mails on trains on which full or apartment railway post-office cars are not authorized, except as hereinbefore provided. The authorizations for closed-pouch service shall be for units of seven feet and three feet in length, both sides of car. (28 U. S. C. 530)

Where authorizations are made for cars of the standard lengths of sixty, thirty, and fifteen feet, as provided by this section, and the railroad company is unable to furnish such cars of the length authorized, but furnishes cars of lesser length than those authorized, but which are determined by the department to be sufficient for the service, the Postmaster General may accept the same and pay only for the actual space furnished and used, the compensation to be not exceeding pro rata of that provided by this section for the standard length so authorized: *Provided*, That the Postmaster General may accept cars and apartments of greater length than those of the standard requested, but no compensation shall be allowed for such excess lengths. (28 U. S. C. 532)

In computing the car miles of the full railway post-office cars and apartment railway post-office cars, the maximum space authorized in either direction of a roundtrip car run shall be regarded as the space to be computed in both directions, unless otherwise mutually agreed upon. (28 U. S. C. 534)

The Postmaster General is authorized to make special contracts with the railroad companies for the transportation of the mails where in his judgment the conditions warrant the application of higher rates than those herein specified, and make report to Congress of all cases where such special contracts are made and the terms and reasons therefor. (28 U. S. C. 565)

All cars or parts of cars used for the Railway Mail Service shall be of such construction, style, length, and character, and furnished in such manner as shall be required by the Postmaster General, and shall be constructed, fitted up, maintained, heated, lighted, and cleaned by and at the

expense of the railroad companies. No pay shall be allowed for service by any railway post-office car which is not sound in material and construction and which is not equipped with sanitary drinking water containers and toilet facilities, nor unless such car is regularly and thoroughly cleaned. (28 U. S. C. 537)

Railroad companies carrying the mails shall furnish all necessary facilities for caring for and handling them while in their custody. They shall furnish all cars or parts of cars used in the transportation and distribution of the mails, except as herein otherwise provided, and place them in stations before the departure of trains at such times and when required to do so. They shall provide station space and rooms for handling, storing, and transfer of mails in transit, including the separation thereof, by packages for connecting lines, and such distribution of registered mail in transit as may be necessary, and for offices for the employees of the Railway Mail Service engaged in such station work when required by the Postmaster General, in which mail from station boxes may be distributed if it does not require additional space.

If any railroad company carrying the mails shall fail or refuse to provide cars or apartments in cars for distribution purposes when required by the Postmaster General, or shall fail or refuse to construct, fit up, maintain, heat, light, and clean such cars and provide such appliances for use in case of accident as may be required by the Postmaster General, it shall be fined such reasonable sum as may, in the discretion of the Postmaster General, be deemed proper. (28 U. S. C. 538)

The Postmaster General shall in all cases decide upon what trains and in what manner the mails shall be conveyed. Every railroad company carrying the mails shall carry on any train it operates, and with due speed, all available matter, equipment, and supplies directed to be carried thereon. If any such railroad company shall fail or refuse to transport the mails, equipment, and supplies when required by the Postmaster General on any train or

trains it operates, such company shall be fined such reasonable amount as may, in the discretion of the Postmaster General, be deemed proper. (28 U. S. C. 539)

All railway common carriers are hereby required to transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith. (28 U. S. C. 541)

The Interstate Commerce Commission is hereby empowered and directed as soon as practicable to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of such mail matter by railway common carriers and the service connected therewith, prescribing the method or methods by weight, or space, or both, or otherwise, for ascertaining such rate or compensation, and to publish the same; and orders so made and published shall continue in force until changed by the commission after due notice and hearing. (28 U. S. C. 542)

The procedure for the ascertainment of said rates and compensation shall be as follows.

Within three months from and after the approval of this act, or as soon thereafter as may be practicable, the Postmaster General shall file with the commission a statement showing the transportation required of all railway common carriers, including the number, equipment, size, and construction of the cars necessary for the transaction of the business; the character and speed of the trains which are to carry the various kinds of mails, the service, both terminal and en route, which the carriers are to render; and all other information which may be material to the inquiry, but such other information may be filed at any time in the discretion of the commission. (28 U. S. C. 545)

All the provisions of the law for taking testimony, securing evidence, penalties, and procedure are hereby made applicable. (28 U. S. C. 548)

For the purpose of determining and fixing rates or compensation hereunder the commission is authorized to make such classification of carriers as may be just and reasonable and, where just and equitable, fix general rates applicable to all carriers in the same classification. (28 U. S. C. 549)

Pending such hearings, and the final determination of the question, if the Interstate Commerce Commission shall determine that it is necessary or advisable, in order to carry out the provisions of this section, to have additional and more frequent weighing of the mails for statistical purposes, the Postmaster General, upon request of the commission, shall provide therefor in the manner now prescribed by law, but such weighing need not be for more than thirty days. (28 U. S. C. 550)

At the conclusion of the hearing the Commission shall establish by order a fair, reasonable rate or compensation to be received, at such stated times as may be named in the order, for the transportation of mail matter and the service connected therewith and during the continuance of the order the Postmaster General shall pay the carrier from the appropriation herein made such rate or compensation. (28 U. S. C. 551)

Either the Postmaster General or any such carrier may at any time after the lapse of six months from the entry of the order assailed apply for a re-examination, and thereupon substantially similar proceedings shall be had with respect to the rate or rates for service covered by said application, provided said carrier or carriers have an interest therein. (28 U. S. C. 553)

For the purposes of this section the Interstate Commerce Commission is hereby vested with all the powers which it is now authorized by law to exercise in the investigation and ascertainment of the justness and reasonableness of freight, passenger, and express rates to be paid by private shippers. (28 U. S. C. 554)



That it shall be unlawful for any railroad company to refuse to perform mail service at the rates or methods of compensation provided by law when required by the Postmaster General so to do, and for such offense shall be fined \$1,000. Each day of refusal shall constitute a separate offense. (28 U. S. C. 563)

## APPENDIX B

OPINIONS AND DECREES OF THE THREE JUDGE UNITED STATES DISTRICT COURT FOR THE AUGUSTA DIVISION OF THE SOUTHERN DISTRICT OF GEORGIA

(Copied from Plaintiffs' Exhibit 1, the said Exhibit being the transcript of record, Supreme Court of the United States, October Term, 1937 No. 63; the United States of America and Interstate Commerce Commission vs. W. V. Griffin and H. W. Purvis, Receivers for Georgia & Florida Railroad, Appeal from the District Court of the United States for the Southern District of Georgia.)

OPINION AND DECREE—Filed January 23, 1935 (Trans. in No. 63 (1947) R. 29)

IN UNITED STATES DISTRICT COURT

In Equity, No. 207

W. V. GRIPPIN and H. W. PURVIS, Receivers for Georgia & Florida Railroad, Petitioners

v.

THE UNITED STATES OF AMERICA AND INTERSTATE  
COMMERCE COMMISSION

OPINION AND DECREE—Filed January 23, 1935

This is a suit by W. V. Griffin and H. W. Purvis, Receivers of the Georgia & Florida Railroad, against the United States of America and the Interstate Commerce

Commission to enjoin, set aside, amend, and suspend an order of such Commission of May 10, 1933, denying an application for increased compensation for the transportation of mail. The suit is brought under U. S. C. A. Title 28, Sections 41 (27 and 28) and 43-48.

No other facts were established or sought to be established than those set forth in such order of said Commission, a copy of which is annexed to petitioners' complaint; and it is therefore considered unnecessary and redundant to restate "Findings of Fact" as provided by Equity Rule 70½. The challenge is to the conclusion drawn from undisputed facts.

The facts developed in the "cost study" fully set forth in such order of the Commission were ascertained by the application of rules prescribed by the Commission. All parties to this controversy agree that a "cost study" is not and cannot be mathematically correct but is an approximation. Such "cost study" discloses among other facts that "There was (1) a deficit in net railway operating income from mail of \$4,945.00 based upon 1931 operations". It further disclosed that as regards revenue: "The distribution of expense upon the space ratios shows that the ratio for mail service was 102.79" or that for every dollar applicants received for transporting mails they expended one dollars and 2.79 cents.

The fact that this railroad lost more money on other services rendered by it or that other railroads transported mail under similar, if not identical conditions, at a profit or that this railroad belonged in a certain classification established by such Commission, known as Class 1 railroads and that therefore it should be in accord with other railroads of such Class as to compensation as to mail, do not refute or impair the fact that the compensation allowed this railroad for the transportation of mail does not equal the cost of so doing.

While it is true that "For the purpose of determining and fixing rates or compensation hereunder the Commission is authorized to make such classification of carriers as may be just and reasonable and . . . fix general rates applicable to all carriers in the same classification", it can fix

such rates only "Where just and equitable". 39 U. S. C. A., Section 549.

The transportation of mail by railroads is compulsory but they are "entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith." 39 U. S. C. A., Section 541.

There is no attack upon the efficiency of the operation of this railroad. There is no charge of extravagance. The bald fact remains that this railroad is required in order to escape severe punishment (39 U. S. C. A., Section 563) to transport mail at a compensation fixed by such Commission and that such compensation does not pay the actual cost of service. This compensation is not in compliance with the duty on the United States to pay "fair and reasonable compensation" and is not "just and equitable".

It is therefore ordered and decreed:

(1) That said order of the Interstate Commerce Commission of May 10, 1933, is and has at all times been unlawful and that said order be set aside and annulled.

(2) Said Commission shall take such further action in the premises as the law requires in view of the annulment and setting aside of the said order of May 10, 1933.

Inasmuch as this court has not the authority to fix the compensation we do not deal with the question of what per cent of return on the investment, if any, would be required to make the compensation fair and reasonable.

This 18th day of January, 1935.

SAMUEL H. SIBLEY,  
*United States Circuit Judge.*

WM. H. BARRITT,  
*United States District Judge.*

E. MARVIN UNDERWOOD,  
*United States District Judge.*

[File endorsement omitted.]

OPINION AND DECREE—Filed February 23, 1937 (Trans. in No. 63 (1937) R. 55)

IN UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF GEORGIA, AUGUSTA  
DIVISION

In Equity, No. 228

W. V. GRIFFIN and H. W. PURVIS, Receivers for Georgia &  
Florida Railroad

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE  
COMMISSION

OPINION AND DECREE—Filed February 23, 1937

Effective August 1, 1928, the Interstate Commerce Commission (hereinafter called Commission), in Railway Mail Pay, 144 I. C. C. 675, established rates for transportation of mail by railroads over 100 miles in length and these rates were applied to the Georgia & Florida Railroad. Thereafter the receivers of such railroad made application to the Commission for an alteration of such rates so that they would be fair and reasonable for such railroad. After a test period, investigation and hearing from counsel for applicant and for the Postmaster General the Commission on May 10, 1933, declined to change the rates.

The receivers of such railroad then brought their petition before a Three-Judge Court against the United States of America and against said Commission, praying that said order of May 10, 1933, be declared unlawful and wholly void and that such Commission reopen and reconsider the proceedings and "determine the fair and reasonable rates to be received by petitioners for transportation of the mails, on and after said April 1, 1931".

"No other facts were established or sought to be established than those set forth in said order of said Commission, a copy of which is annexed to petitioners' complaint".  
"The challenge is to the conclusion drawn from the undis-



puted facts." (Previous decision of this court.) The court therefore deemed it unnecessary to state "Findings of Fact", but its judgment did declare certain facts as follows:

"(1) The facts developed in the 'cost study' fully set forth in such order of the Commission were ascertained by the application of rules prescribed by the Commission.

"(2) All parties to this controversy agree that a 'cost study' is not and cannot be mathematically correct but is an approximation.

"(3) 'The distribution of expense upon the space ratios shows that the ratio for mail service was 102.79' or that for every dollar applicants received for transporting mails they expended one dollar and 2.79 cents.

"(4) The fact that this railroad lost more money on other services rendered by it or that other railroads transported mail under similar, if not identical, conditions at a profit or that this railroad belonged in a certain classification established by such Commission, known as Class 1 railroads, and that therefore it should be in accord with other railroads of such class as to compensation as to mail, do not refute or impair the fact that the compensation allowed this railroad for the transportation of mail does not equal the cost of so doing. The Commission can fix such rates only 'Where just and equitable.'

"(5) The transportation of mail by railroads is compulsory but they are 'entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith.'

"(6) There is no attack upon the efficiency of the operation of this railroad. There is no charge of extravagance."

The said order was annulled and the Commission was directed to take such further action as the law requires. There was no appeal from this decision.

Thereafter the Commission of its own motion reopened such proceeding, which resulted in a report on February 4,

1936, again establishing the same rates which this court had declared unlawful.

It becomes important to ascertain what, if any, additional testimony, or what, if any, different rules of law warranted such conclusion.

For the reason that neither report states definitely "Findings of Fact" as such it is not easy to ascertain what different facts existed at the different hearings. We will do our best to ascertain the differences in facts and in rules of law following the course of discussion in the last report.

The report, after quoting from brief of applicant, states:

"There is implicit in the statement quoted, and in the corresponding portion of the opinion referred to, the assumption that if the department discontinues mail service on applicant's trains the applicant will thereby be saved the expenditures of \$1.0279 for every dollar of revenue it thus loses."

We do not concur in this statement. The opinion definitely states that these figures were derived by "the distribution of expense upon the space ratios" and by the employment of methods approved or directed by the Commission. However, we deem this difference in interpretation immaterial.

The argument of the Commission to destroy the effect of its methods previously used is thus stated:

"\* \* \* Relative costs derived from a series of studies of expenditures for operations common to a number of services cannot be converted into absolute costs by using a single-figure relation derived from such studies.

"The cost computed in the manner described is a hypothetical cost and not an actual cost, and is not necessarily conclusive as applicant contends. In other mail-pay proceedings, in which space authorized and paid for was found to be the space that should be charged to mail in cost studies similar to that here, consideration was given to other factors as well, such as the amount and character of the unused space reported as operated (Railway Mail Pay, 85 I.C.C. 157, 170; 123 I.C.C. 33, 39); the actual space occupied by

mail, as distinguished from authorized space, determined by the mail load carried, based upon a count of bags and of packages outside of bags, and, in some instances, by the weight (Railway Mail Pay, 95, I.C.C. 493, 500, 511; 120 I.C.C. 439, 446); comparisons with compensation received from other services in passenger-train cars (Railway Mail Pay, 144 I.C.C. 675, 706); comparisons with freight rates (Railway Mail Pay, 144 I.C.C. 675, 705; 151 I.C.C. 734, 742); comparisons per car-mile and per car-foot miles of the computed cost of mail service and the revenue from authorized mail service with the computed cost of corresponding units in passenger-train service as a whole (Railway Mail Pay, 144, I.C.C. 675, 699); and the character of the service performed in connection with transporting the mail (Railway Mail Pay, 56 I.C.C. 1, 8; Electric Railway Mail Pay, 58 I.C.C. 455, 464; 98 I.C.C. 737, 755)."

Neither applicant nor this Court entertains the view that the hypothetical cost is "necessarily conclusive". It is merely the fairest method that has been devised. If "actual cost" as to each item be required applicants would be helpless and the Commission would be reduced to guessing. What elements may have been considered here, and should not be in the absence of supporting testimony and some indication as to what weight was given each element. Further, there is no testimony here as to "unused space reported as operated." There is included payment for unused space not operated, of which more later. There is nothing to justify disregard of the fact used in the first report that "space authorized for mail is regarded as space used."

The law as established in this case by the previous decision, unreversed, makes inapplicable "comparisons with compensation received from other services in passenger train cars"; "Comparisons with freight rates"; and "comparisons per car-mile and per car-foot mile of the computed cost of mail service and the revenue from authorized mail service with the computed cost of corresponding units in passenger-train service as a whole."

There is no criticism of "the character of the service performed in connection with transporting the mail."

Further argument of the Commission, as we understand

it, is that because 30 feet instead of 15 feet is partitioned off for mail this adds 15 feet to the unused space for which the post office department pays a part. We do not so understand the testimony. Our understanding is that the unused space is the same wherever the partition be placed.

There is however this further finding of fact implied, though not definitely stated, viz: that an unnecessarily large car is used and this adds to the portion paid by the mail for unused space and that if 15 feet were eliminated from the car the mail space ratio would be reduced to 10.79 per cent, resulting in a profit to applicant from mail of \$1,711.

Lengthily are theories and possibilities advanced to establish that a different result might be reached if different methods were employed "to ascertain and compute the proportions of operating expense and the separations into expenses for freight service and passenger service respectively", but there is no justification submitted for abandoning the method employed in making the first report, which was unchallenged as to accuracy and was admitted to have been apportioned "in accordance with the formulas prescribed for Class 1 roads for the separation of expenses between freight and passenger service."

The second report not only does not contradict this but reaffirms it in this language: "The methods are the same as those prescribed in our rules governing separation of such expenses on large steam railroads."

We find nothing that warrants any change in our conclusions as to the legality of the order now before us from our previous conclusion as to the same rates except the fact, stated by implication, that the use of a mixed car shorter by 15 feet would result in a profit from mail revenue of \$1,711 annually. The report discloses "The total mail service investment thus derived was \$457,082." This return is approximately .0037 per cent. This is not "fair and reasonable."

Inasmuch as all the facts constituting the bases for the order of the Commission are fully set out in the report, it is deemed unnecessary to restate them in this opinion. As findings of fact, it is therefore ordered and decreed



(1) That said order of the Interstate Commerce Commission of February 4, 1936, is and has at all times been unlawful and that said order be set aside and annulled.

(2) Said Commission shall take such further action in the premises as the law requires in view of the annulment and setting aside of the said order of February 4, 1936. This 22nd day of February, 1937.

SAMUEL H. SIBLEY,  
*United States Circuit Judge;*  
W. M. H. BARRETT,  
*United States District Judge;*  
E. MARION UNDERWOOD,  
*United States District Judge.*

(File endorsement omitted.)

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State of Georgia v. The United States

OCTOBER TERM, 1948

ALFRED W. JONES, ATTORNEY FOR GEORGIA & FLORIDA  
BALTIMORE, MARYLAND

The United States

IN DEFENSE OF THE STATE OF GEORGIA & FLORIDA  
IN THE  
SUPREME COURT OF THE UNITED STATES

ALFRED W. JONES, ATTORNEY FOR GEORGIA & FLORIDA  
BALTIMORE, MARYLAND

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# In the Supreme Court of the United States

OCTOBER TERM, 1948

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No. 198

ALFRED W. JONES, RECEIVER FOR GEORGIA & FLORIDA  
RAILROAD, PETITIONER

v.

THE UNITED STATES

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
COURT OF CLAIMS

---

## MEMORANDUM FOR THE UNITED STATES

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### OPINION BELOW

The opinion of the Court of Claims (R. 36) is reported at 77 F. Supp. 197.

### JURISDICTION

The judgment of the Court of Claims was entered on April 5, 1948 (R. 50). The time for filing a petition for certiorari was extended to August 14, 1948 (R. 195). The petition for certiorari was filed on August 5, 1948. The juris-

dition of this Court is invoked under the provisions of Section 3(b) of the Act of February 13, 1925, as amended (now 28 U. S. C. 1255).

#### QUESTION PRESENTED

Whether the requirement of the Railway Mail Pay Act that railway common carriers transport mail for "fair and reasonable compensation", as determined by the Interstate Commerce Commission, constitutes a taking of private property for public use within the meaning of the Fifth Amendment so as to entitle petitioner to recover interest from the United States, as an element of just compensation, for the delay in payment of fully compensatory rates.

#### STATUTE INVOLVED

The relevant portions of the Railway Mail Pay Act (Act of July 28, 1916, 39 Stat. 412 *et seq.*, 39 U. S. C. 523 *et seq.*) are set forth in the Appendix.

#### STATEMENT

Petitioner seeks review of the same judgment as that involved in *United States v. William V. Griffin and Hugh William Purvis, Receivers for Georgia & Florida Railroad*, No. 135, this Term. The "Statement" in the Government's petition in No. 135 (pp. 3-15) is equally applicable in this case and, therefore, will not be repeated.

#### ARGUMENT

Petitioner here contends that the Court of Claims erred in refusing to allow interest on the

principal amount which that Court awarded to petitioner as compensation for the carriage of mail. In support of this claim for interest, petitioner asserts that the Court of Claims' determination of the mail pay due to petitioner involved the determination of just compensation under the Fifth Amendment, thus removing the case from the prohibition of Section 177(a) of the Judicial Code. (28 U.S.C. [1940 ed.] 284(a) against the allowance of interest on claims prior to the rendition of judgment by the Court of Claims.<sup>1</sup> Admittedly, if there had been a taking of petitioner's property in the eminent domain sense, interest from the date of taking to the date of payment would be an element of the "just compensation" required by the Constitution. However, the Court of Claims held that it was giving effect to an order of the Interstate Commerce Commission, rather than determining just compensation, and that interest was therefore not allowable (R. 49).

The Government's petition in No. 135 questions the jurisdiction of the Court of Claims to review orders of the Interstate Commerce Commission fixing railway mail compensation. We anticipate that petitioner will advance the eminent domain theory in No. 135 in support of this jurisdiction.

<sup>1</sup>Section 177(a) is now embodied in 28 U. S. Code, section 2516. Prior to September 1, 1948, it read as follows: "No interest shall be allowed on any claim up to the time of rendition of judgment by the Court of Claims, unless, upon a contract expressly stipulating for the payment of interest."

as well as in support of its claim for interest. Rejection of that theory in No. 135 would dispose of petitioner's claim for interest. *Albrecht v. United States*, 329 U. S. 599, 602; *United States v. Thayer-West Point Hotel Co.*, 329 U. S. 585, 588. Since it thus appears that the underlying issue may be common to both cases, the Government does not oppose the granting of the petition for certiorari in this case if the Court decides to review the merits in No. 135.

If the Court should deny the Government's petition in No. 135, however, we believe the petition here should also be denied because the court below was correct in holding that it was not determining "just compensation" in a proceeding under the Fifth Amendment. (R. 49). There is no showing that the railroad was required to remain in operation, that it was required to run any trains specially for the mail service, or that it was required to add any cars to regularly scheduled trains to transport the mails. On the contrary, the evidence points to the fact that it was not required to assume additional burdens and that authorizations to carry mail were continued to aid the road's precarious financial condition (R. 94, 97, 100, 113, 115-116).

The statutory requirement that railway common carriers transport the mails (39 U. S. C. 541), does not differ significantly from the duty imposed upon carriers generally to furnish transportation service "upon reasonable request therefor." 49 U. S. C. 1(4). The duty to carry the mails at



fair and reasonable rates of compensation determined after administrative hearings does not, therefore, involve a taking of private property for public use any more or any less than the equivalent duty of common carriers by rail to transport freight for the public. It seems clear, however, that the determination of reasonable rates at which utilities are required to serve the public is properly considered a regulation of the use of property within the scope of the police power. *Federal Power Commission v. Hope Gas Co.*, 320 U. S. 591, 601; *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U. S. 575, 582; *Munn v. Illinois*, 94 U. S. 113, 134; cf. *Nebbia v. New York*, 291 U. S. 502, 534-539. The limited scope of judicial review in railroad rate cases (see, e. g. *New York v. United States*, 331 U. S. 284, 331, 349) and the recognition that rate-making is essentially a "legislative power" (*Munn v. Illinois*, *supra*, at 133-134; *Federal Power Commission v. Natural Gas Pipeline Co.*, *supra*, at 586) are inconsistent with the view that the regulatory measures constitute an exercise of the power of eminent domain. Thus the opinion of Mr. Chief Justice Stone in the *Natural Gas Pipeline* case, states (p. 586):

The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been designated are free, within the ambit of their statu-

tory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, *the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped.* If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result; our inquiry is at an end. [Italics supplied.]

We submit accordingly that the court below was correct in holding that determination of reasonable rates for transporting the mails did not involve the question of a taking of private property for public use, and that the question which petitioner here seeks to raise, does not of itself, warrant review.

#### CONCLUSION

While we do not oppose the granting of the petition in the instant case if the Government's petition in No. 135 is granted, it is respectfully submitted that the instant petition for a writ of certiorari should be denied if the petition in No. 135 is denied.

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H. G. MORISON,  
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PAUL A. SWEENEY,

MORTON LIFTIN,

NOVEMBER, 1948

*Attorneys.*

## APPENDIX

The following sections of Title 39 in the U. S. Code are sections of the so-called "Railway Mail Pay Act" (Act of July 28, 1916, 39 Stat. 412, 425-431):

§ 524. Conditions of railway service; adjustment of compensation:

The Postmaster General is authorized and directed to adjust the compensation to be paid to railroad companies for the transportation and handling of the mails and furnishing facilities and services in connection therewith upon the conditions and at the rates hereinafter provided.

§ 525. Classes of routes enumerated:

The Postmaster General may state railroad mail routes and authorize mail service thereon of the following four classes, namely: Full railway post-office car service, apartment railway post-office car service, storage-car service, and closed-pouch service.

\* \* \* \* \*

§ 527. Apartment railway post-office car service.

Apartment railway post-office car mail service shall be service by apartments less than forty feet in length in cars constructed, fitted up, and maintained for the distribution of mails on trains. Two standard sizes of apartment railway post-office cars may be authorized and paid for, namely, apartments

fifteen feet and thirty feet in length, inside measurement, except as hereinafter provided.

\* \* \* \* \*

§ 530. Closed-pouch service.

Closed-pouch mail service shall be the transportation and handling by railroad employees of mails on trains on which full or apartment railway post-office cars are not authorized, except as hereinbefore provided. The authorizations for closed-pouch service shall be for units of seven feet and three feet in length, both sides of car.

§ 531. Rates of payment for classes of routes.

The rates of payment for the services authorized in accordance with sections 524-541, 542-568 of this title shall be as follows, namely:

\* \* \* \* \*

(b) *Apartment railway post-office car service.*

For apartment railway post-office car mail service at not exceeding 11 cents for each mile of service by a thirty-foot apartment car and 6 cents for each mile of service by a fifteen-foot apartment car.

\* \* \* \* \*

(d) *Closed-pouch service.*

For closed-pouch service, at not exceeding 11½ cents for each mile of service when a three-foot unit is authorized, and 3 cents for



each mile of service when a seven-foot unit is authorized.

§ 541. Transportation required in manner, under conditions, and with service prescribed by Postmaster General; compensation therefor.

All railway common carriers are hereby required to transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith.

§ 542. Interstate Commerce Commission to fix and determine rates and compensation.

The Interstate Commerce Commission is empowered and directed to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of such mail matter by railway common carriers and the service connected therewith, prescribing the method or methods by weight, or space, or both, or otherwise, for ascertaining such rate or compensation, and to publish the same, and orders so made and published shall continue in force until changed by the commission after due notice and hearing.

§ 543. Relation between the railroads as public-service corporations and the Government to be considered.

In fixing and determining the fair and reasonable rates for such service the commission shall consider the relation existing between the railroads as public-service corporations and the Government, and the nature of such service as distinguished, if there be a distinction, from the ordinary transportation business of the railroads.

\* \* \* \* \*

§ 547. Notice by Interstate Commerce Commission to railroads; answer of railroads; hearings.

Thereupon the commission shall give notice of not less than thirty days to each carrier so required to transport mail and render service, and upon a day to be fixed by the commission, not later than thirty days after the expiration of the notice herein required, each of said carriers shall make answer and the commission shall proceed with the hearing as provided by law for other hearings, between carriers and shippers or associations.

\* \* \* \* \*

§ 549. Classification of carriers by Interstate Commerce Commission.

For the purpose of determining and fixing rates or compensation hereunder the commission is authorized to make such classification of carriers as may be just and reasonable and, where just and equitable, fix general rates applicable to all carriers in the same classification.

\* \* \* \* \*

§ 553. Applications for reexaminations.

Either the Postmaster General or any such carrier may at any time after the lapse of six months from the entry of the order assailed apply for a reexamination, and thereupon substantially similar proceedings shall be had with respect to the rate or rates for service covered by said application, provided said carrier or carriers have an interest therein.

§ 554. Powers conferred on Interstate Commerce Commission.

For the purposes of sections 524-541, 542-568 of this title the Interstate Commerce Commission is vested with all the powers which it is authorized by law to exercise in the investigation and ascertainment of the justness and reasonableness of freight, passenger, and express rates to be paid by private shippers.

\* \* \* \* \*

§ 557. Information from Interstate Commerce Commission as to revenues from express companies; rates for transporting matter other than first class.

The Postmaster General shall, from time to time, request information from the Interstate Commerce Commission as to the revenue received by railroad companies from express companies for services rendered in the transportation of express matter, and may, in his discretion, arrange for the transportation of mail matter other than of the first class at rates not exceeding those so ascertained and reported to him, and it shall be the duty of the railroad companies to carry such mail mat-

ter at such rates fixed by the Postmaster General.

\* \* \* \* \*

§ 563. Refusal to perform service at rates or methods of compensation provided by law.

It shall be unlawful for any railroad company to refuse to perform mail service at the rates or methods of compensation provided by law when required by the Postmaster General so to do, and for such offense shall be fined \$1,000. Each day of refusal shall constitute a separate offense.

\* \* \* \* \*

§ 565. Special contracts for transportation; reports of.

The Postmaster General is authorized to make special contracts with the railroad companies for the transportation of the mails where in his judgment the conditions warrant the application of higher rates than those specified in sections 524-541, 542-568 of this title.



LIBRARY  
SUPREME COURT, U. S.

Nos. 135 and 198.

Office: Supreme Court, U. S.  
**FILED**

**MAY 2 1949**

**CHARLES ELMORE CROPLEY**  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1948.

THE UNITED STATES, *Petitioner*

v.

ALFRED W. JONES, Receiver for Georgia and Florida  
Railroad.

ALFRED W. JONES, Receiver for Georgia and Florida  
Railroad, *Petitioner*.

v.

THE UNITED STATES

**PETITION FOR RE-HEARING.**

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FILED: May 3, 1949

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1948.

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No. 135

THE UNITED STATES, *Petitioner*

v.

ALFRED W. JONES, Receiver for Georgia and Florida  
Railroad.

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No. 198

ALFRED W. JONES, Receiver for Georgia and Florida  
Railroad, *Petitioner*.

v.

THE UNITED STATES

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**PETITION FOR RE-HEARING.**

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*To the Supreme Court of the  
United States:*

Your petitioner, Alfred W. Jones, Receiver for Georgia and Florida Railroad, respectively requests a rehearing of the order of this Court April 18, 1949 reversing the judgment of the United States Court of Claims and remanding the cause with instructions to dismiss.

**Summary Statement of Facts.**

This suit in the Court of Claims is for the recovery in quantum meruit upon a quasi contract necessarily implied from the constitutional duty laid upon the Federal Government to pay just quantum meruit compensation for a law-

ful taking of property under the provisions of a statute, viz., the Railway Mail Pay Act of 1916.

Prior to the filing of the suit all administrative remedies were exhausted, viz., by an unsuccessful effort to get the Interstate Commerce Commission to fix a schedule of prices for the unit items taken which would yield enough to meet the duty of the Government to pay just compensation on a quantum meruit basis.

In the proceedings before the Commission the carrier on the one side and the Post office Department on the other were the only parties to the proceeding. The Post Office Department frankly admitted that the schedule of pay which was currently being applied to this carrier was insufficient to yield this carrier just compensation (Trans. in 63 (1937) p. 142); and participated in a joint study for the purpose of developing the facts as to the cost to this carrier alone. That study was upon the same basis usually and customarily followed in all such ascertainment. Its chief witness, who conducted the field test for the Post Office Department testified that it was the most equitable he could devise (Trans. in No. 63 (1937) pp. 169, 170). The Commission found that said joint cost study indicated that 87.4% more than the unit price schedules being currently applied would be necessary to meet the cost and pay the carrier a reasonable return.

Despite that evidence the Post Office Department urged the Commission to disregard the evidence on the cost of the service, and, instead of fixing new unit price schedules which the evidence justified, to impose other and plainly inadequate unit price schedules which the Commission had promulgated on a different record in another case; and the Commission followed just that course. To support its action the Commission gave various reasons, all of which so wholly lacked merit, that any presumption of correctness or weight was rebutted.

The carrier first sought relief from the Commission's arbitrary action by a suit for injunction in a three-judge



Federal Court, and on the showing that the Commission had acted arbitrarily and unreasonably, and its orders were confiscatory, that Court twice issued decrees directing the Commission to take other and different action which would meet the constitutional duty to pay the claimant just compensation. On appeal, however, this Court held in the *Griffin* case that the three judge court did not have jurisdiction, and, in effect, referred the carrier to the Court of Claims for remedy under the latter's jurisdiction over claims either under (a) an Act of Congress, or (b) as a matter of constitutional right to just compensation.

Following this Court's said decision in the *Griffin* case, the present suit was filed in the Court of Claims on both of the aforesaid grounds of jurisdiction, but more particularly upon the ground of confiscation.\*

Ample proof that the Commission's order was arbitrary, unreasonable and confiscatory was made in the lower court in the form of a copy of the transcript of the record before this Court in the *Griffin* case, No. 63, October Term, 1937. That proof included all the detailed evidence in the 1931 proceeding before the Commission, together with the Commission's findings and orders with relation thereto.\*\* The Court made comprehensive special findings of fact appropriate to the evidence to which no exceptions were taken, but, unfortunately, in passing upon the allowance of interest, it said it was giving effect to an order of the Commission as properly construed, and was not determining compensation in an original proceeding under the Fifth Amendment. This carrier petitioned this Court for writ of certiorari to review the decision on specifications of errors upon these points.

\*This Court handed down its decision in which (1) first it reasoned that if the proceeding was one for the review of

\* Before the case came to trial in the Court of Claims, the proceedings were suspended on motion of the carrier, to petition the Commission for a rehearing and reconsideration. That petition was so filed but was summarily denied.

\*\* Incidentally all of that evidence is within the judicial notice of the Court.

an order of the Commission in a rate case the lower Court had not followed the correct principles in that kind of a proceeding; and (2) then concluded that the Court of Claims did not have the power to substitute its judgment for that of the Commission on review of a rate order; and on that footing reversed the judgment and remanded the cause to the Court of Claims with instructions to dismiss it.\*

\* The opinion does not indicate that the Court gave any consideration to the effect of the plaintiff's own exceptions in Case No. 198 to the error of the Court of Claims in resting its decision upon the wrong grounds; and seems to have been lead by the defendant's representations into several misapprehensions, including the following:

(1) (Page 4, par. 3). That the suit involved a reconsideration of the Commission's order of July 10, 1928 (144 L. C. C. 675); whereas it was expressly confined to the period on and after April 1, 1931.

(2) (Page 10, par. 1). That the suit was one for review of a legislative rate order; whereas it was a suit in quantum meruit on quasi contract.

(3) (Page 12, par. 3). That the general classification of carriers and general rates applicable to all carriers by the Commission under 39 U. S. C. 549 had been in issue before the Commission; whereas the 1931 proceeding before the Commission was only under 39 U. S. C. 553, and the question of general classification of carriers and rates based on classification under 39 U. S. C. 549 were not in issue in the Court below.

(4) (pp. 13, 14, 15, 16). That the crux of the present case was the question of how to treat unused space in passenger train cars; whereas the record, in evidence here, of the proceedings before the Commission showed that such contentions of the defendant were without merit.

(5) (Page 16, par. 2, 3). That the rates applied to this carrier 1928-1931 were in issue; whereas the suit at bar was restricted wholly to a period on and after April 1, 1931.

(6) (Page 17, par. 20, 23). That the "factors", "circumstances", or "reasons" given by the Commission to justify its disregard of its finding upon the joint cost study, were entitled to presumptive weight; whereas the record showed they were invalid and worthless.

(7) (Page 23, par. 1). That the lower Court improperly disregarded the effect of that part of the statute (39 U. S. C. 549) which authorized the Commission to classify carriers and make general rates for them; whereas the action of the Commission under 39 U. S. C. 549 was not in issue, and this carrier was under no duty to attack the same.

(8) (Page 23, par. 2; Page 24, par. 2; Page 28, par. 2). That this Court "cannot say" that the Commission acted arbitrarily, and "the Carrier has not sustained its burden of showing that the Commission acted arbitrarily or unreasonably"; whereas it is ascertainable from the detailed record of the proceedings before the Commission that the Commission did act arbitrarily and unreasonably, that its order was confiscatory, and that the plaintiff did sustain the burden upon it that detailed record was before the lower Court, and is presently before this Court, either in the transcript in this case, or in the transcript in case No. 63 (1937) of which this latter Court can take judicial notice.

### Question Presented.

*Was, and is, the third remedy cited, as suggested in the Griffin case, viz. a suit in a Federal District Court, barred by the Tucker Act, since the gist of the action is for the enforcement of a right in quasi contract necessarily implied from the Fifth Amendment.*

This question is substantial because an answer in the affirmative would fairly require that the case be remanded for correction instead of being ordered dismissed.

The precise question herein presented was not previously presented because it was never conceived that the suit brought and proven as a claim in quasi contract within the jurisdiction of the lower Court, would be disposed of *as though* it had been brought for a review of an order of the Commission, or *as though* the plaintiff had not duly excepted to the error of the Court below in failing to put the decision upon the ground that it was determining compensation in an original proceeding under the Fifth Amendment.

### Grounds of Petition for Rehearing.

The rule that equity will not take jurisdiction where there is an adequate remedy at law, would seem to bar suit in a Federal District Court for the exercise of equity jurisdiction because the Government has provided another adequate remedy in the Tucker Act, viz. it may be sued in the Court of Claims in an action the gist of which is a claim in quantum meruit against the Government.\*

The above grounds are substantial because: (a) a conclusion on the question in the affirmative would fairly re-

\* This ground is not the same as those reasons given in oral argument in reply to questions from the bench as to why the plaintiff had not resorted to the third remedy suggested in the Griffin case. Those reasons were: (1) the same opinion had pointed out two possible remedies in the Court of Claims; (2) that the sum involved was greater than could be sued upon in a District Court, and (3) that the same opinion had reaffirmed the so-called "Negative Order Doctrine", as a bar to the review of Commission action.

quire reconsideration of the opinion and decision in other respects; while, on the other hand (b) a conclusion in the negative would seem to yet give the plaintiff a remedy, since there is no statute of limitation to prevent the Commission from reopening the proceedings before it and reconsidering its action, if so required by a District Court in the exercise of equity powers.

In any event there is no question but that the plaintiff brought its action in the lower Court as being on a claim in quantum meruit, and not as a proceeding to review the Commission's action. Perhaps some confusion has arisen due to the form of the evidence with which the plaintiff proved that it was entitled to the sum claimed, and that it had exhausted its administrative remedy because of the arbitrary, unreasonable and confiscatory order of the Commission. It happened simply that ample proof on these points was compactly available in the transcript of the record before this Court in the *Griffin* case, No. 63, October Term, 1937, which included all the detailed evidence in the 1931 proceeding before the Commission, together with the Commission's findings and orders with relation thereto. Therefore, it was only natural that the Court of Claims should analyze and refer so freely in its opinion to the Commission's positions on the evidentiary facts in the process of coming to its own independent con-

Incidentally they misled the Court by the argument that, in determining the amount which the Federal Government should pay a railroad for carrying the mails, the Interstate Commerce Commission was fixing a rate just as it fixes a rate for carrying a passenger or a piece of freight. That would account for the fact that the opinion construes the language of the lower Court as meaning that it intended to act as a Court for the review of an order of an administrative body. However, in the view of the plaintiff the lower Court did not so intend and although its phraseology was unfortunate, the plaintiff respectfully submits that it should be read in the light of the fact that the lower Court was evidently trying to conform its wording to the wording used by this Court in the *Griffin* case in holding that there were two grounds of jurisdiction, viz., (1) statutory, (2) constitutional.

The plaintiff respondent brought its action upon both grounds, and it was to explain the denial of interest that the Court of Claims declared that it was putting its decision upon only the first and not upon the second ground of jurisdiction. In doing that the lower Court erred, and the plaintiff properly excepted thereto, hence it is respectfully submitted that the case should be remanded for correction instead of being dismissed, especially since it concerns an absolute constitutional right.



7  
clusion on a money judgment. *That survey of the evidence in a suit on a judicial issue of constitutional just compensation for a money judgment is wholly different from a review of a Commission's order on a legislative issue.*

In *U. S. v. New York Central R. Co.*, 279 U. S. 73, this Court made it clear that, instead of this kind of a case being one for the review of the action of an administrative body in the ordinary determination of a "fair and reasonable rate", that, to the contrary, railway mail service is made compulsory, and the amounts which the Federal Government is required to pay for such service constitutes compensation for a compulsory taking. Therefore, it follows that the fixing of such compensation is not the fixing of an ordinary rate but is a determination of a schedule of unit prices which will produce what is the just and reasonable compensation as required by the Constitution. The fact that it is the latter is not altered merely because (1) the Congress selected the Interstate Commerce Commission as the initial medium for determining the basis for and measure of the prices for the units at which should be reckoned the amounts necessary to pay just compensation; or that (2) the term employed to designate such prices was the word "rates"; and or (3) that those from whom the use of property are taken are common carriers.

In the "landmark" case of *Monongahela Nav. Co.*, 148 U. S. 312, 327, this Court said:

"By this legislation Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial, and not a legislative question. The legislative may determine

*\* Just Compensation Defined.*

"The word 'just' is used to intensify the meaning of the word 'compensation'. Its purpose is to convey the idea that the equivalent to be rendered for property taken shall be *real, substantial, full, and ample*; and *no legislature can diminish by one jot the rotund expressions of the constitution.*" *Virginia, et al. R. Co. v. Henry*, 8 NEV. 165, 172.

what private property is needed for public purposes—that is a question of a political and legislative character, but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public taking the property, through Congress or the legislature, its representatives, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.”

### **Conclusion.**

WHEREFORE the petitioner respectfully prays this Court to grant rehearing herein.

Respectfully submitted,

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FILED: May 3, 1949.

### **Certificate of Counsel.**

I hereby certify that the petition for rehearing in the above entitled matter is presented in good faith and not for delay and that it is restricted to intervening circumstances of substantial effect (*Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U. S. 47, 50) and to substantial grounds which petitioner did not previously present.

MOULTRIE HITT.

MAY 3, 1949.